



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

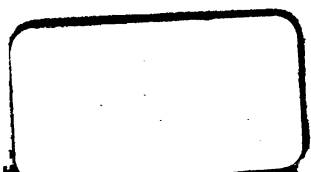
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

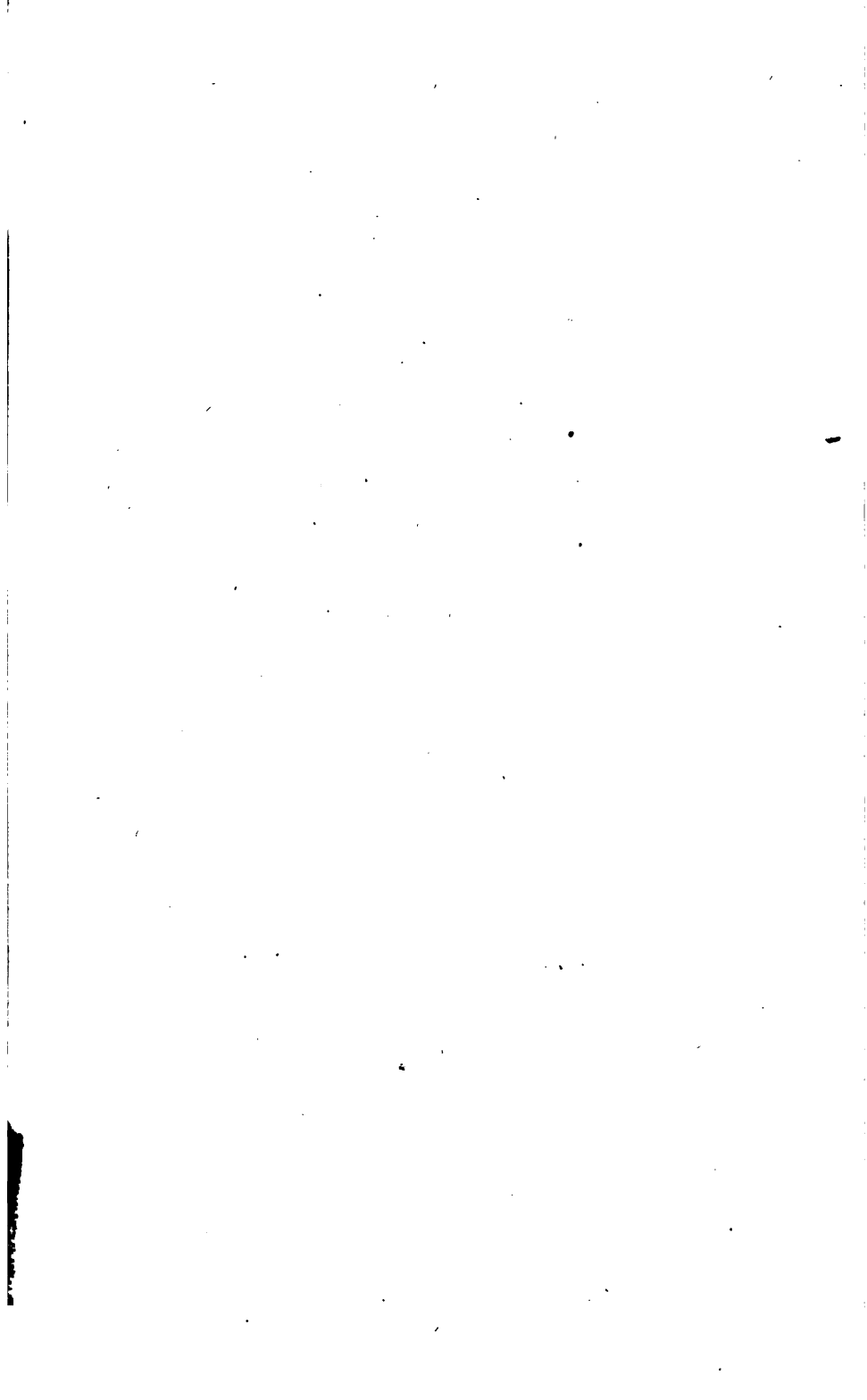


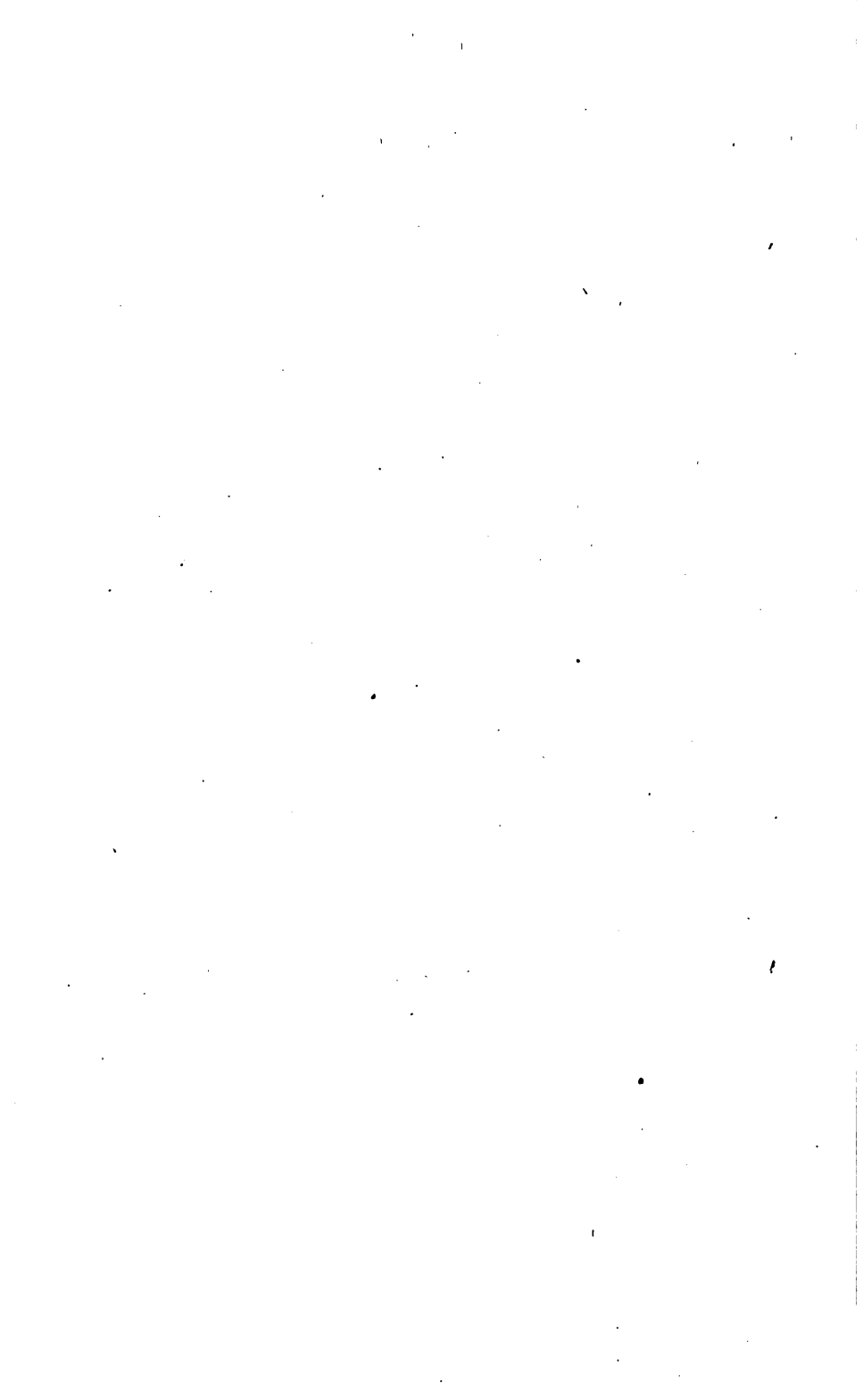


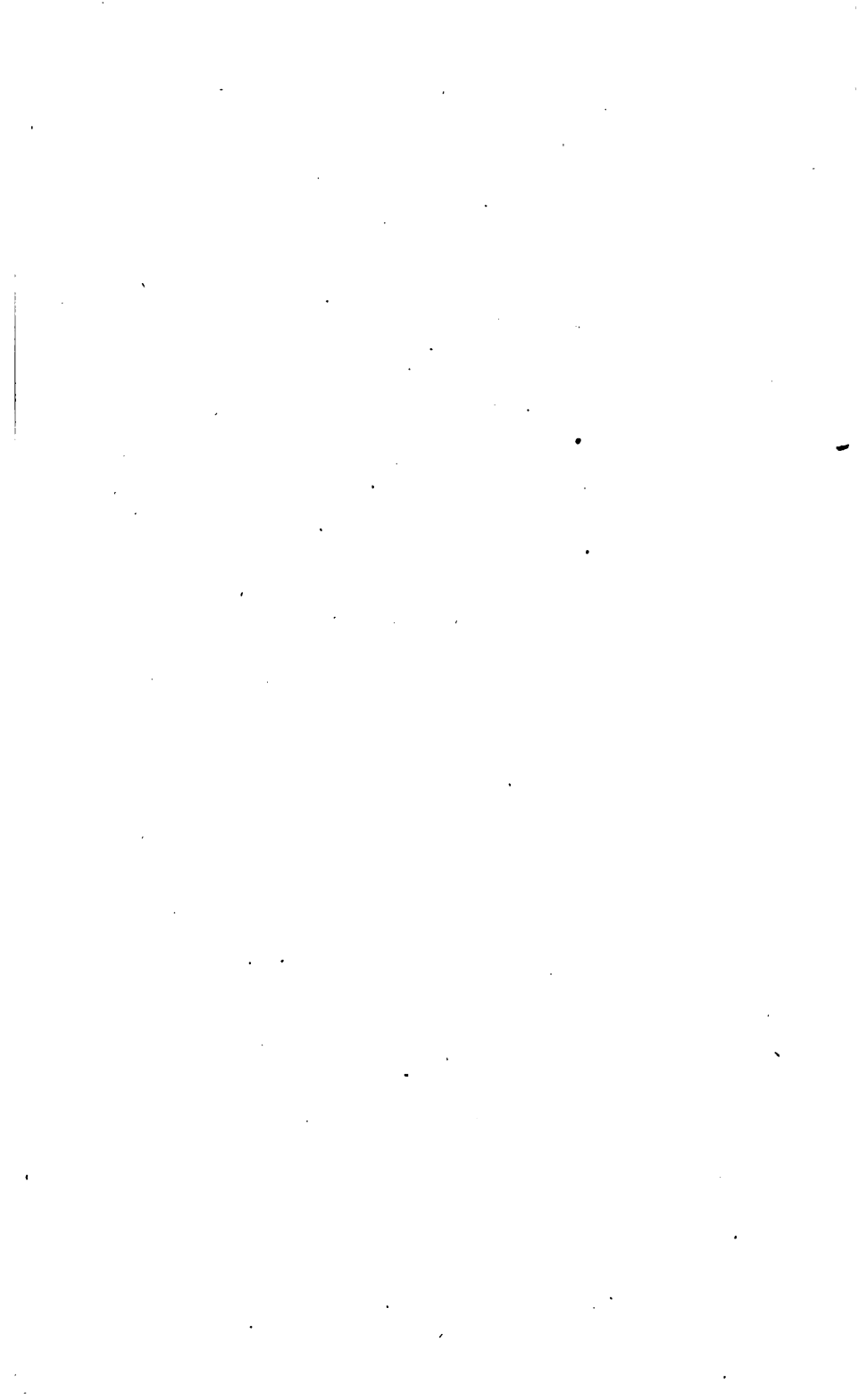
Exa. 100. 100. 100.
1. 100. 100.

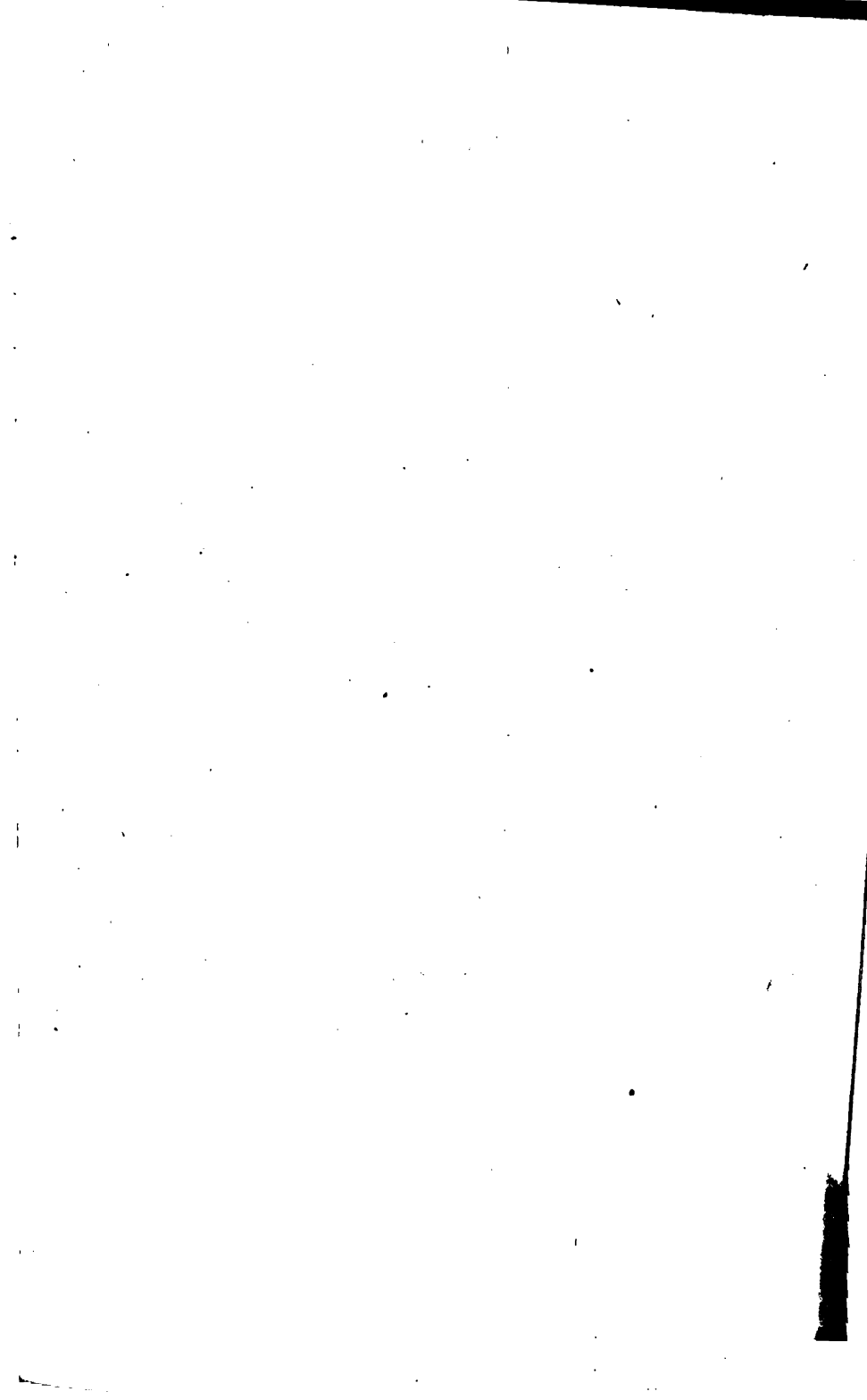














THE
154
LAW MAGAZINE
AND

LAW REVIEW,

OR

Quarterly Journal of Jurisprudence.

MAY to AUGUST 1860.

VOLUME IX.

LONDON:

BUTTERWORTHS, 7, FLEET STREET,

Law Publishers in ordinary to the Queen's most Excellent Majesty.

EDINBURGH: T. & T. CLARK, AND BELL & BRADFUTE.

DUBLIN: HODGES & SMITH.

1860.

THE ASIAN WAR

THE ASIAN WAR
LIBRARY OF THE
STANFORD, JR., UNIVERSITY
LAW DEPARTMENT

59,156

M'CORQUODALE AND CO., PRINTERS, LONDON.
WORKS, NEWTON.

THE ASIAN WAR

THE ASIAN WAR

THE ASIAN WAR
THE ASIAN WAR
THE ASIAN WAR
THE ASIAN WAR
THE ASIAN WAR

THE ASIAN WAR

INDEX TO VOL. IX.

OF THE

Law Magazine and Law Review.

- Arbitrations, 172.
Arrest of the Five Members, 205.
Austin, John, 164.
Bankruptcy and Insolvency Bill, 1860, 122.
Bar Examination Questions, 382.
Causes Célèbres.—No. II. The Watchman of Eldagsen, 290.
Chancery Evidence Report, 410.
Civilians of Doctors' Commons, 265.
Commission Agents, 274.
Common Law Commission, 147.
Consolidated Orders of the Court of Chancery, 36.
Consolidation of Joint Stock Companies Acts, 109.
Conveyancing in South Australia, 91.
Corrupt Practices at Elections, 95.
Events of the Quarter, 183, 425.
Gloucester Bribery Commission, 95.
Inns of Court, No. II., 21.
Joint Stock Companies' Acts—Proposed Consolidation of the, 109.
Judges' Chambers, 171.
Juridical Society, 75.
Law Amendment Society's Papers :—
 Law University, 392.
 Laws affecting Lunacy, 408.

- Law and Equity Bill, 147.
- Law and Lawyers in the British Colonies, 118.
- Liberty of the French Bar, 43.
- Lincoln's Inn Benchers, 21.
- Lord St. Leonard's Act, Points decided under, 174.
- Lunacy Law and its Defects, 1.
- Maritime Law—Master and Owner, 241.
- Mystery in English Legislation, 91.
- Notices of New Books, 178, 419.
- Reporters and Reporting, 321.
- Reviews :—
- Hilliard's Law of Torts, 65.
 - Tudor's Leading Mercantile Cases, 280.
 - Lindley's Law of Partnership, 312.
 - Heron's Introduction to the History of Jurisprudence, 343.
 - Drury's Cases in Chancery : Temp. Napier, 357.
- Temple, Finance in the, 21.

THE
Law Magazine and Law Review.

OR,
QUARTERLY JOURNAL OF JURISPRUDENCE.

No. XVII.

ART. I.—THE LUNACY LAW AND ITS DEFECTS.

WHILE a Select Committee of the House of Commons is sitting to inquire into the Lunacy Law of England, a summary of that law, and of, what appear to us, its salient defects, may not be wholly uninteresting to the public.

Lunatics may be divided into those found so by inquisition, and those who have not been the subjects of such an inquiry. The places legalized for their special reception may be enumerated as county and borough asylums, registered lunatic hospitals, and licensed houses. There are, moreover, a few lunatics in gaols, as well as a limited number dispersed singly in private houses, under medical certificate of insanity. To these we must add many illegally received into private houses as “nervous patients” without such certificate, and a still larger number improperly, if not illegally, detained in our numerous work-houses.

Let us first consider lunatics found so by inquisition. Little exception can now, we venture to think, be taken to the cost or procedure of an inquisition in lunacy. In the great majority of cases the cost does not exceed £75; in some it has been as low as £40—these, of course, are unopposed cases; but in the opposed our Judges in Lunacy are most vigilant in checking unnecessary expenditure, and their vigilance is rarely defeated. An order for an inquisition is now obtained from the Lord Chancellor or Lords Justices of the Court of Appeal in Chancery, upon a short petition, presented generally by a relation or connection of the alleged lunatic, but sometimes by a stranger; this petition must be supported by medical and other testimony, and must be filed in the office of the Registrar in Lunacy. A groundless application is at the peril of costs, and, moreover, subjects the petitioner to an action at law: service of a copy of the petition upon the alleged lunatic, if within the jurisdiction, is necessary a week before its hearing; and, if the petitioner be a stranger, service is also necessary on the lunatic's nearest relations. Should the lunatic disregard the service, should the petition be by a relation or connection, and should no opposition be offered, the Judges read the petition and affidavits, and dispose of the matter in private, refusing an order only when not convinced of its propriety, or when they entertain a doubt as to the existence of the alleged lunacy, otherwise the hearing is in open court. In this latter case, usually by a perusal of the petition, and by a species of judicial cross-examination of the counsel engaged, rather than by an ordinary hearing, the Judges arrive at the facts and decide thereon, sometimes relying on their own unassisted judgment—sometimes taking independent medical advice. An order will not be made without evidence of the truth of the allegations of insanity in the petition, and the evidence generally includes affidavits of medical men who have personally visited and examined the alleged lunatic, and who should state, not only their opinion as to his state of mind, but the very deeds or words on which they rely as evincing his lunacy; further, the judges refuse an order unless they have at least a strong and high belief

that their judgment, should it be called in question, will be affirmed.

An order for an inquisition may also be obtained on a report of the Commissioners in Lunacy, which, when filed with the registrar, is tantamount to a petition.

When an inquisition is ordered, one of the two Masters in Lunacy holds it, and without a jury, unless the Judges direct a jury, or the alleged lunatic, being capable of volition, desires a jury, or unless he be without the jurisdiction—the carriage of the inquisition is given to the person whom the Judges think most likely to bring out the truth, and he names, subject to the approbation of the Master, a convenient place for holding the inquiry. Theoretically the inquisition is public, but unless publicity is aided by the summoning of a jury, the proceeding is not calculated to draw public attention, and in the great majority of cases it is practically a private investigation; with or without a jury, the inquisition is conducted like an ordinary trial at law; the lunatic is generally seen by the Master and jury, and always has timely notice of the day and place of inquisition, which he may oppose either in person or by professional agents, whose remuneration is certain should their unsuccessful contention be free from fraud, litigiousness, and frivolity. Any person who is pecuniarily interested in dealings by the lunatic, which the verdict may overreach, can also get leave to attend. The issue, unless a retrospective inquiry be specially directed, is confined to the question whether or not the alleged lunatic is then of unsound mind, and incapable of managing himself or his affairs; the verdict is forwarded to the Petty Bag Office, and then, if it deny the lunacy, *cadit questio*; if it find the lunacy, the custody of the person and estate of the lunatic devolves on the Sovereign as *parens patriæ*. This custody is delegated to the Judges in Lunacy, and from them an appeal lies only to the Queen in Council.

Immediately after the verdict, if the lunatic do not traverse—i. e., call for a new trial—which he is entitled to do, officers to take care of his person and estate are appointed by the Master,

who also ascertains his property and debts, and settles his maintenance allowance, subject to the approbation of the Judges in Lunacy (under whom the Master acts ministerially), and after communication with the family of the lunatic. The officers are styled Committees, and act merely as bailiffs. The only rules to which the Master must adhere in the selection of a Committee of the person are, special preference of the person whose appointment will be most conducive to the happiness and welfare of the lunatic, and general preference of a relation of the lunatic, and of a female when the lunatic is an unmarried lady. He who is, in the Master's opinion, most likely to manage the lunatic's property to the best advantage, has the strongest claim to the committeeship of his estate. The Committees receive no remuneration, though it has been hitherto judged expedient not to call the Committee of the person to a strict account of his expenditure, which is, however, limited to the maintenance allowance. The Committee of the estate accounts strictly for all his receipts and payments, and on his appointment gives security so to do: interference with either Committee is a contempt of the Judges in Lunacy, and punishable as such. Any misconduct on the part of the Committees may, nevertheless, be brought to the notice of the Judges, who can censure, punish, or remove their officers, and invariably hold a strict hand over them. In the performance of his duty, the Committee of the person must blend affection with firmness: it is his duty to visit his charge and to provide for his comfort, regard being had to the maintenance allowance. In making that allowance, the Judges and Master have nothing to consider but the situation of the lunatic himself, looking always to the probability of his recovery, and never regarding the interest of his nearest relations except so far as he is concerned. It is also the duty of the Committee of the person to send half-yearly reports to the Visitors of Lunatics, who, as well as the Commissioners in Lunacy, exercise a general supervision over the care and treatment of this class of our insane. The duty of the Committee of the estate is to administer it *tanquam bonus paterfamilias*, making

every advantage fairly to increase and improve it, without engaging in risks and dangerous adventures; and he may not take any extraordinary step in the administration without the previous sanction of the Judges in Lunacy, whose sole consideration should be, and is, the benefit of the lunatic, coupled with a desire that if he recover he shall find his property in *statu quo*. To facilitate a prudent management of the property, the Committee of the estate has, since the year 1853, been armed with various statutory powers; including powers of sale, exchange, mortgage, and leasing for certain purposes, exerciseable, however, only under order of the Judges in Lunacy. The heir, or other person entitled to succeed the lunatic in his property, and some of his nearest relations selected by the Master, are also served with previous notice of every important step in the administration of his affairs. This notice is given, not that they may have an opportunity of protecting their own interests, which are, indeed, disregarded in lunacy, but because by reason of their kinship they may be able, and by reason of their expectant interest they may be willing, to give valuable information touching the matters under consideration.

If the lunatic recovers from his mental disorder, and his recovery seems permanent, he may apply to the Judges in Lunacy for a *supersedeas* of the inquisition. His proper course of proceeding is to present a petition supported by medical evidence of his recovery; a copy of the petition, with the order of the Judges for its hearing—which is almost of course—must then be served by him on his Committees, heir, and next of kin, and they are entitled to be heard in open court at the hearing; there also the petitioner must personally appear for examination, unless he be in a very bad state of health, in which case he must submit himself to an examination by a medical nominee of the Judges. If he succeed in his application a writ of *supersedeas* is issued; the royal custody thereupon ceases; he is reinstated in his property; his Committees are discharged, and any balances due from the Committee of his estate to him are immediately paid over: in some cases, a

partial but incomplete recovery has been met by partial relaxations of the custody.

If the lunatic never permanently recovers his reason, the royal custody continues till his death, then a Master in Lunacy ascertains the lunatic's executor (if any), provides for the lunatic's burial, takes and passes the final account of the Committee of the estate, discharges both the Committees, and delivers over the lunatic's property to the persons who have become entitled thereto.

We should here mention that the charges of administration in Lunacy are defrayed by a graduated percentage, estimated on the clear yearly incomes of the several estates under management; also by certain fees payable upon proceedings in Lunacy. The percentage on an income between 100*l.* and 1000*l.* is at the rate of 4*l.* per cent., but not exceeding 30*l.* yearly; between 1000*l.* and 5000*l.* at the rate of 3*l.* per cent., but not exceeding 100*l.* yearly; above 5000*l.* at the rate of 2*l.* per cent., but not exceeding 200*l.* yearly; the percentage and fees in cases where the annual income is below 50*l.*, or where the *corpus* of the property is under 700*l.* in value, the Judges may remit; these percentage, payments, and fees amount to about 8000*l.* per annum, and this class of lunatics numbers about six hundred, who are dispersed in asylums, hospitals, licensed-houses, and as single patients, a few living in their own homes. †

The above statement may perhaps suffice to explain the law touching inquisitions in Lunacy, and the persons found lunatic thereby, who are sometimes erroneously called "Chancery Lunatics." In truth, Chancery has no jurisdiction whatever over them, though the Lord Chancellor has been usually selected, and latterly the Lords Justices have been named with him, to execute this "prerogative" right of custody: their commission is under the royal sign-manual.

The defects in this department of Lunacy law are, we are inclined to believe, and we have paid some attention to it, few and far between. This opinion is strengthened rather than weakened by the complaints of the alleged Lunatics' Friend Society,

whose well-meaning efforts, mainly directed to the protection of lunatics found so by inquisition, have failed to elicit any flagrant abuses. We are not among those who think that these lunatics should be placed under control of the Commissioners in Lunacy; indeed, we lean to the opinion that the Commissioners should cease to visit them. Three officers appointed by the Lord Chancellor, and styled Visitors of Lunatics, now look after these insane persons, and know the pecuniary circumstances of each of them, which the Commissioners do not. The Visitors appointed by the Lord Chancellor should, no doubt, be more actively employed, and they, as well as the Registrar, should not hold their appointments "at pleasure," but *dum se bene gesserint*; they might then be withdrawn from all other business whatsoever, and after a certain period of service be fairly superannuated; the due performance of the Visitors' duties involves physical as well as mental exertion—here, as in many other cases, *juncta juvant*.

Let us now pass on to that "motley offspring of disordered wit" upon whom no inquisition has been held, some for lack of property, some from a family dread of publicity, some because their mental affliction has scarcely exceeded congenital weakness of intellect, or impaired understanding, or wayward eccentricity. These persons should all, we venture to think, be to some extent restrained of their liberty of action. The safety of the public, the good of society, and the welfare of the individuals themselves, alike demand this; but, while many thousands of them are placed in a temporary state of confinement, calculated to utilize their future liberty, almost as many are left uncared for, if not abandoned to injudicious or cruel treatment. The great majority of these helpless beings are, as we might suppose, paupers; the legal provisions in their behalf are chiefly statutory, and call loudly for consolidation. This law, indeed, should be the subject of a simple code intelligible to all; but it is diffuse and complex.

The case of the "hapless lunatic pauper at large," has perhaps the first claim to our attention :—

“The country gives me proof and precedent
Of bedlam beggars who, with roaring voices,
Strike in their numb'd and mortified bare arms
Pins, wooden pricks, nails, sprigs of rosemary,
And with this horrible object—from low farms,
Poor pelting villages, sheepcots, and mills,
Sometime with lunatic bans, sometime with prayers—
Enforce their charity.”

Although these lines may not be verified in England in this nineteenth century, yet the fearful misery which the pauper victim of insanity necessarily suffers and creates in his poverty-stricken home, can scarcely be exaggerated; can it be that the only legal provision for his mental disorder, while with his friends, is a quarterly visit from his parish doctor, and that there are above five thousand lunatic paupers now living with their friends in England and Wales? Let us next imagine the lunatic pauper in a work-house, where, by reason of his chargeability, he not seldom gains admission; though he can only be treated as a sane pauper there, and cannot legally be confined, he may too frequently be seen in its ward under mechanical restraint or wholly neglected. From such injudicious treatment nothing but the worst consequences can flow, both to the ratepayers and to the lunatic; their taxation is perpetuated, and his disorder is confirmed. The work-house was established for the sane pauper, and many hold that it is good policy to render the place a distasteful home even to him; how, then, can it meet the wants of the lunatic, whose disorder demands a soothing and special treatment, both of mind and body, and whose cure is all important to the public finances? The chief excuses offered for this detention are “a saving of present outlay” (which is, indeed, a most shortsighted frugality), and “a conviction that the individual is incurable” (the conviction, be it remembered, of a magistrate or parish officer or doctor, who has in fact never, or but very slightly, studied the complaint): such excuses call for no rejoinder. The Commissioners in Lunacy may, it is true, visit and do visit the workhouse, may inquire into the treatment there of the lunatic pauper, and may report thereon to the Poor-Law Board; but the

Commissioners and the Poor-Law Board are, Lord Shaftesbury tells us, powerless to rectify much of the evil, and we apprehend there is no authority other than Parliament which can do so. In the name of common-sense and humanity we say, let the legislation remove this foul blot in our lunacy system. Nearly eight thousand of our lunatic fellow-countrymen are in work-houses; though the mischief cannot perhaps be undone in a day or in a year, public feeling is outraged by legislative apathy in the matter. As the law now stands, the pauper lunatic *may* be sent to a lunatic asylum: we hope that the day is not far distant when we shall be able to write—*must* be sent thither. A good step in that direction would be, we venture to think, the compulsory transmission to asylums of all *future* cases of insanity among the poor. We recall to mind the Italian proverb—“E megglio aver oggi un ovo che dimani una gallina.”

But to proceed with the existing law. It is now the duty of every parish doctor to notify to the relieving officer, or, if no such officer exist in the parish, to one of its overseers, the lunacy of any pauper resident within the doctor's district, and the necessity of the lunatic's removal to an asylum; it is also the duty of every relieving officer, and, where there is no such officer, it is the duty of each overseer to bring the lunatic, or, indeed, any pauper vagrant in his jurisdiction and deemed to be lunatic, before a justice; and it is the office of that justice, by the aid of a medical man, to examine the pauper, and if that medical man certifies, and the justice agrees with him in thinking, that the pauper is lunatic, and a proper person to be taken charge of and detained under care and treatment, the justice may make an order for his being so taken charge of and detained. It may be, however, that the pauper cannot be brought before a justice, then the justice, or the parish clergyman, together with the relieving officer, or, if there be no such officer in the parish, an overseer may examine the pauper any where, call in a medical adviser, and make a similar order. The costs of the proceedings are chargeable on the parish by the justice; and, upon a certificate of insanity by the parish doctor and medical adviser, the order is

not discretionary. Moreover, it is the duty of every constable to apprehend and take every pauper vagrant within his jurisdiction, and deemed to be lunatic, before a justice, who may deal with the prisoner as with the pauper in the cases already stated. For wilful breach of these duties, any parish officer or constable is, we may remark, fineable £10. The order to which we have alluded authorizes the pauper's reception into some asylum, registered hospital for lunatics, or licensed house; but if the pauper can be admitted into the asylum of the city or borough, or the asylum with which the borough has contracted for the reception of its lunatics, thither he must be sent. Without the order, and the medical certificate, and a statutory certificate by the relieving officer or overseer, no lunatic pauper is admissible into any asylum, hospital, or house. Every such medical certificate must specify the facts which support the conclusion of lunacy, some of which, at least, must have been observed by the certificant himself; and it may not be signed by any practitioner whose father, brother, son, partner, or assistant, signed the order for reception; further, the certificate does not admit to any asylum whose medical officer signed it.

We come now to consider the provisions of the law for receptacles for our pauper lunatics. In the year 1853 the justices of every county in England and Wales were required by parliament, if their county had then no fit public asylum for pauper lunatics, to provide such an asylum forthwith, and to do so in one of two ways; viz., to erect or otherwise provide an asylum for their county exclusively, or to unite with some other county, or borough, or lunatic hospital in erecting or otherwise providing an asylum for their joint use. The justices of certain of the English and Welsh boroughs were at the same time placed by the legislature under a similar obligation but an option was given to them of contracting with the managing body of any county or borough asylum for reception of their lunatic paupers as boarders. Every county and borough asylum was then placed under the government of a Committee of Visitors, to be annually elected from the city and borough justices, when, however,

a hospital united with the latter, it was to be represented in the Committee by a certain number of its subscribers. Various enactments were also passed by Parliament to secure proper accommodation in, and supervision of these asylums; and every Committee was also empowered to contract with any other Committee, or with any hospital subscribers, or any owner of a licensed house, for the reception of its pauper lunatics. Under this pressure most of our counties have provided asylums at a great cost: the Middlesex asylums at Hanwell and Colney Hatch must be in the recollection of the reader; but more are called for. The chief deficiency, however, is of borough asylums. A few small boroughs were, by act of Parliament, annexed to counties, for providing a joint county and borough asylum; but there are still very many small boroughs, unable to meet the cost of a separate asylum, to which the Act should be extended.

Knowing now more precisely whither the pauper may be conveyed under the order of reception, let us follow him to an asylum. It may not be amiss to observe here that his settlement is unaffected by his removal. When admitted into the asylum the pauper is *prima facie* chargeable to the parish whence he was taken, until it has shown that his settlement is elsewhere, or that it cannot be ascertained. On the officers of that parish, the justice by whom the pauper is sent, or any two justices from whose jurisdiction he is sent, or who are visitors of the asylum, or within whose jurisdiction it is, may make an order for his maintenance on the production of satisfactory evidence; the latter may also inquire and, subject to an appeal to the general quarter-sessions, may adjudicate upon the pauper's last legal settlement. If the settlement be shifted, they may make an order of maintenance accordingly, and require the settlement parish to recompense the parish *prima facie* chargeable its expenditure; if the settlement is unascertainable then the county in which the pauper was found is liable to the cost of his maintenance, recoverable, however, from any parish wherein the county may eventually fix his settlement. Once taken and detained under an order for reception, the pauper lunatic is well cared for; if he be in

an asylum he is constantly under the eye of a medical officer—a resident in the building, and experienced in the treatment of insanity—whose chief aim is to effect a cure. He may be visited, of course under restrictions, by his friends, by any minister of religion whom he may invite, and by his parish officers or their medical man. There is a chaplain attached to the asylum, by whose ministrations he may, if a member of the Church of England, benefit, and there is divine service at least weekly in the building; his dietary is well regulated, and he has, in common with the other patients in the asylum, as we are inclined to think, a reasonable number of attendants; there is healthful exercise for his mind and body within the asylum and its precincts; in a word, there is a discipline in every way calculated to promote his mental recovery, while his bodily comforts are far from disregarded. If the pauper be sent to a lunatic hospital instead of to an asylum, the curative treatment in most of them is, we have reason to believe, equally good; in a licensed house we can scarcely expect that he should meet with the same style of comfort which a public asylum or hospital, from its large size and funds, can supply at a low price. Yet in the licensed house the condition of the pauper is immeasurably superior to that which we could dare to hope for him in the great majority of our work-houses; for in the licensed house, as in the asylum or hospital, his case is submitted to skilful medical treatment, and he is himself brought more prominently under the attention of the Commissioners in Lunacy, and if in the provinces likewise of the justices selected for visiting the insane poor.

In the asylum, hospital, or licensed house, as the case may be, the lunatic pauper now awaits his removal, discharge, or death. Let us dwell for a moment on the provisions for his *removal*. By the order of two visiting justices of his county or borough asylum, he may be removed thither from any other asylum, or any hospital or licensed house; and, by the order of two visiting justices of any asylum, he may be removed from such asylum to any other asylum, hospital, or licensed house; but to this latter removal, except it be to an asylum within, or

belonging wholly or in part to, the county within which the asylum from which he is removed is situate, or the county in some parish of which is the lunatic's settlement, or to some hospital or licensed house within such county, or to some asylum, hospital, or licensed house, wherein the lunatic can be received under a subsisting contract, the consent of the Commissioners is necessary. Each of these removals is, however, checked by the necessity of a medical certificate of the fitness of the lunatic for removal, which certificate must be signed by the medical officer of the asylum or hospital, or by the medical practitioner visiting the house from which the removal is contemplated. Two of the Commissioners may also order the removal of any lunatic from any asylum, hospital, or house, to another. Further, two visitors of any asylum may, with the advice of its medical officer, permit any patient therein to be absent from the asylum upon trial for such period as they may think fit; and there is a power of sending, or taking under proper control, a patient from a hospital or licensed house to any specified place, for any definite time, for the benefit of his health; but, unfortunately, this power is not coupled with a direction for the pauper's maintenance during his absence.

Next, we may offer a few observations upon the *discharge* of the lunatic from confinement. Three Visitors of an asylum, or any two, with the advice of the asylum superintendent, may discharge any patient therein, whether recovered or not, and notice of the step may be given by them to the pauper's parish officers, who must in that case remove him. Any two Visitors may also deliver over a pauper patient to the care and custody of his relatives or friends, if they will undertake, to the Visitors' satisfaction, that the pauper shall be no longer chargeable to any union, parish, or county, and shall be prevented from doing injury to himself or others. A lunatic patient in a hospital may be discharged by two Commissioners in Lunacy, one of them a physician; and a patient in a licensed house may be discharged by two of its Visitors, one of them being a medical practitioner.

If the lunatic pauper *dies* in the asylum, its consecrated

burial-ground receives his remains, unless the Committee of Visitors have agreed, as they may do, with the proprietors of a cemetery, or with a burial board, for the interment of his body elsewhere; or his remains may be conveyed to the burial-ground of the parish of the asylum; or the Visitors may arrange for such interment with the minister and churchwardens of any adjoining parish.

We have now broadly stated the case of the rich and pauper lunatic; between those two classes, however, exists a third, whose small property does not necessitate an inquisition, and who cannot afford to pay even the present reduced cost of a royal custody; all these should, if not living at home, be under order of detention and medical certificate, and be liable to official visitation; but the law on the subject has hitherto been set at defiance, and with impunity. The law declares that no person except one deriving no profit from the charge, or a Committee appointed in lunacy, shall, without such certificate, receive to board or lodge, or take the care or charge, of an insane patient; yet many are the patients so received and taken charge of as nervous patients. If the delinquents were indicted by the officers in lunacy this evil might be lessened; at present, all the patients of this class known to the Commissioners do not much exceed 150 in number.

At common law, only persons who are actually lunatic, and whom it would be dangerous to leave at large, can be restrained of their liberty; but by statute law any lunatic may be confined in an asylum, registered hospital for lunatics, or licensed house, or as a single patient in an unlicensed house; nowhere, however, can he be received and detained without an order and a medical certificate of insanity, in a certain statutory form.

The licences for houses for the reception of lunatics in London, Westminster, and Southwark, and within seven miles thereof, are granted periodically by the Commissioners in Lunacy; elsewhere by the Justices at sessions—they are revocable by the Lord Chancellor only.

For reception into any asylum, the order is a request by a person named therein (who need not be a relation or connection),

that the superintendent will receive an individual named in the order as a patient; and subjoined to this request is a statement of facts touching the patient's past career and present position, which must be filled up and signed by some person acquainted therewith; the certificate should be that of two medical practitioners, neither of them in partnership or an assistant to the other, and each of whom must, separately from the other, have personally examined the patient within a week of the reception. In special cases, indeed, the certificate may be by one medical practitioner; but then the statement must give the reason, and two similar certificates must follow within three days, to render further detention justifiable. Each of the certificates must specify the facts upon which it is founded, and must distinguish the facts in the personal knowledge of the certificant from the other facts, as the latter are *per se* insufficient; further, no physician, surgeon, or apothecary, who, or whose father, brother, son, partner, or assistant, signs the order, can sign the certificate, and no patient may be received into any asylum upon or under any certificate signed by a medical officer of the asylum. The order and certificate or certificates are examined, as well as the new patient, by some of the Committee of Visitors on their next visitation, and the patient is seen periodically by the Committee and Commissioners; a list of all such patients is also sent half-yearly to the Commissioners.

The private patient in the asylum is subject to discharge, whether cured or not, by three Visitors, in like manner as a pauper patient. He may also be set free on trial, or be by the Commissioners removed. Further, when the person who signed the order for his reception directs his discharge or removal, he must be discharged or removed accordingly; if such person be dead, or lunatic, or out of the country, then the person who made the last payment on account of the patient, or the husband or wife; or if no husband or wife, the father; or if no father, or he be incapable, the mother; or if she be incapable, then any of the nearest of kin of the patient may discharge or remove him elsewhere; in the latter case, it seems that the previous consent

of the Commissioners is necessary. In case of the death of such patient in the asylum, notice must be given to the person who signed the order, or who made the last payment on account of him.

Most of these lunatics are taken to the registered hospitals and licensed houses, or are cared for singly. The reception of a lunatic of this class is legal only upon such an order and certificates as are necessary in the case of admission to an asylum. Every such hospital must have a resident medical superintendent, or attendant; so must every licensed house with one hundred patients. If there are fifty patients only in the licensed house, a doctor must visit daily; if a less number, a visit twice a-week suffices; if there are less than eleven patients, the Commissioners may require only a fortnightly visit. The lunatic in the hospital must be seen once a-year by two of the Commissioners in Lunacy, one of them being a physician or surgeon; and the lunatic in the licensed house four times a-year, unless he be without the immediate jurisdiction of the Commissioners, in which case he is seen by them twice only a-year, and four times by the Committee of Visitors. No notice is given of these visits.

The Commissioners visiting any licensed house in the country, are bound to consider carefully the state of mind of any patient therein confined, as to the propriety of whose detention they should doubt, and to call the special attention thereto of the justices who visit that house. To check abuses, any lunatic hospital may be visited by day or by night by two Commissioners; any licensed house by two Visitors' Justices. The lunatic may be discharged or removed from the hospital or house by those who placed or keep him there, or by his family, in like manner as he might be removed from an asylum. He may also be discharged by two Commissioners or Visitors. With the previous assent of two Commissioners, a discharged patient may remain as a boarder in a licensed house, and any relative or friend may board with a patient therein; but they must always appear, if required, before the Commissioners when the latter visit.

As to single lunatic patients in restraint. Whoever, deriving

a profit from the charge, receives to board or lodge in any unlicensed house, or takes the care or charge of any one patient as a lunatic or alleged lunatic, is guilty of a misdemeanour, unless within a week he sends to the Commissioners in Lunacy copies of the order and certificates on which he has received the lunatic—the order and certificates must be like those required on the reception of a patient into a licensed house; he must likewise communicate to the Commissioners the date and place of the reception, and at the same time his own name. Every such patient must thenceforth be visited by a medical practitioner, not deriving, and not having a partner, father, son, or brother, who derives, any profit from the charge; and that practitioner must enter in a book the date of his visits, and a statement of the condition of his patient's health, both mentally and bodily, and of the condition of the place of reception, which book a Commissioner who visits the patient inspects. The person by whom the care or charge has been taken, or into whose house the lunatic has been received, must also (stating it broadly) transmit to the Commissioners the same notices and statements as are necessary in the case of a patient not a pauper in a licensed house. Any one Commissioner, on the direction of two Commissioners, may at all reasonable times visit the house, and inquire and report to his colleagues on the treatment and state of health, both bodily and mentally, of the patient, and the Lord Chancellor may on such report order a removal of the patient.

The licensed and unlicensed houses wherein lunatics are confined, have recently been attacked somewhat violently, and the proprietors (though many of them are physicians of high standing) have been stigmatized as men devoid of all proper feeling; but hitherto the sweeping allegations of improper treatment of the lunatics therein detained have been ill-supported by evidence of a trustworthy nature. The privacy of such houses, no doubt, engenders suspicion; but we must recollect that there are many persons who, if such houses were abolished in this country, would, rather than submit to publicity, send their lunatic rela-

tions abroad ; the legalisation of such houses seems to us the lesser evil—the houses should, however, be narrowly watched by the Commissioners and Visiting Justices.

Taking a retrospective glance at the third class of lunatics which, we have said, lies between the rich and poor in this country, their chief and growing want seems to be a sufficient number of receptacles. Being a degree above pauperism, it is inexpedient that they should share the crowded buildings set apart for our insane pauper population ; and yet they cannot, for lack of means, become boarders in the hospitals and licensed houses. Suggestions have been thrown out by Lord Shaftesbury and others, from time to time, for the establishment of self-supporting middle-class asylums, the first outlay on which should be guaranteed by our counties ; but we fear such a scheme would meet with very great opposition from the tax-paying community, and we do not despair of seeing private benevolence supply, what all must admit, is a great desideratum. One of our best-conducted hospitals in or about London (St. Luke's), receives a few boarders at, we believe, a guinea per week ; but even that charge is too high for many persons.

We have now briefly traced the chief features of the law of England concerning the care and treatment of lunatics against whom no crime has been charged. We must not altogether omit mention of the criminal lunatics in our different jails and asylums, and especially in the Hospital of Bethlehem, and Fisherton House Asylum in Wiltshire, who number from 600 to 650. For their separate detention a State asylum is now building near Sandhurst in Surrey : they consist of persons found lunatic on arraignment, or become such while in custody, during trial, or after sentence passed, and of persons acquitted on the ground of insanity, but ordered to be kept in custody during the Sovereign's pleasure. If any prisoner under sentence of death, transportation, or imprisonment, or under a charge of any offence, or for not finding bail for good behaviour, or to keep the peace, or to answer a criminal charge, or in consequence of any summary conviction, or order by any justice, or civil

process, appears to be insane, two justices of the place where the person is imprisoned, and two physicians or surgeons, may inquire into his sanity; and if they all certify thereto, the Secretary of State for the Home Department may thereupon order his removal to any county lunatic asylum, or other proper receptacle for insane persons which the Secretary may think fit, and there the prisoner must be kept until two physicians or surgeons certify his sanity to the Secretary, who may thereupon remit him to his former custody, unless his period of imprisonment has expired, in which event he must be discharged. In all such cases, unless the Secretary otherwise directs, any two justices of the place wherein the prison is, may inquire into and ascertain the lunatic's settlement, and his pecuniary circumstances. If they find that he is not possessed of sufficient property applicable to his maintenance, they may charge his parish with the cost of such inquiry, and of his conveyance to the place of confinement, also with a weekly sum for his maintenance there. If they cannot ascertain his settlement, then the justices may fix the county borough or place where the prison is, with such cost and weekly sum; on the other hand, if the justices find that the lunatic is possessed of property that is applicable for or towards the expenses incurred, or to be thereafter incurred on his behalf, the justices may, by order, subject to appeal at the quarter sessions, authorize the overseers of any parish where the property is, to seize, sell, and apply it to such purposes, they accounting for the same at the next petty sessions of the division, city, or borough where the order has been made.

By an act passed in the first year of the reign of her present Majesty, it is also enacted that, where any person has been discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing some crime, for which, if committed, such person would be open to indictment, two justices of the place may view and, with the aid of a medical practitioner, examine the prisoner, and if they believe him to be insane, or a dangerous idiot, they may order the con-

stable, or overseers of the poor of the place to convey him to the county asylum; should no such asylum exist, then to some public hospital, or some house duly licensed for the reception of lunatics. The justices may then, subject to an appeal to quarter sessions, adjudge his settlement, and may order that settlement parish to pay the charges of examination, conveyance, and future maintenance in confinement; where, however, the settlement cannot be ascertained, the order must be on the city or borough.

In the act which established Pentonville prison, special provision is made for the removal of any convict therein to a county asylum, under a warrant from the Home Office, issuing upon a report of the Commissioners in Lunacy. The erection of the State Asylum will supply a great defect in the law. In no ordinary prison can insanity be properly treated, and in the herding of criminal lunatics, legally and morally innocent though they be, with other insane persons, much harm may obviously ensue to the latter, whose sensitive feelings are often heightened by their malady. The power of discharging a criminal lunatic in custody during her Majesty's pleasure, has hitherto been most sparingly exercised, and we think wisely; the maxim "*publicum bonum privato est preferendum*," applies strongly to their detention for life.

So much for the care and treatment of lunatics in England. We have dwelt on this subject already, perhaps, at too great length, and in too minute detail for most readers, and will only now add that, as to the civil responsibility of a lunatic, he is not liable at law on contract except for necessities, because mutual consent is the first element of contract; but he is responsible in damages for injury done by him to another, in violation of the law, because damages are by way of satisfaction, and not of penalty. His testimony is admissible *quantum valeat*; as to his criminal responsibility, it is a principle of natural justice and of our law, that *actus non facit reum nisi mens sit rea*, the intent and the act must both concur to constitute crime. If a lunatic knows the nature of the act he is doing, and that he is doing what is

wrong, he is as responsible in the eye of our law for that act as any other man.

Reminding the reader that we have not aimed at giving more than an outline of the system of lunacy in this country, we now take our leave of the subject for the present. "*Qui e nucẽ nucleum esse vult nucẽ frangat.*" But the kernel in question is within a very tough nutshell—the Lunacy Law of England being, in fact, far from satisfactory either to the lawyer or the philanthropist.

ART. II.—INNS OF COURT.

No. 2.—FINANCE IN THE TEMPLE. LINCOLN'S INN BENCHERS.

THE greatest encouragement to a writer, when discussing subjects of public importance, is to find that his remonstrances and suggestions bear fruit; and we indeed have derived much satisfaction in knowing that our remarks¹ upon the monstrous ignorance and excessive waste exhibited in the restoration of the Temple Church, have received due attention, and that one step at least—we do not say that it was rational, but it was still a step—was immediately taken in consequence of our comments.

It will be recollected that we gave, among other examples of the blunders of the Benchers of the Temples, necessarily arising from the constitution of such bodies, an instance of the exceeding weakness and ignorance exhibited in the editing of the Temple Church Anthem Book. Our readers will recollect that we referred to the selection of hymns made for the congregation of lawyers to sing on Sundays, as probably the worst which could have been made. We referred to the insertion therein of psalms which cannot be *sung* because of their imperfect rhythm and accent, and the introduction of hymns which, on account of the "awful mirth" which the quaint phraseology would occasion in the church, could never be intentionally set before the choir.

¹ *L. M. & R.*, No. xvi., (February, 1860.)

Amongst other instances, we mentioned that of the droll taste which induced the choice of the verse—

“The barren wilderness shall smile
With *sudden greens.*”

Struck with the horrid conviction of this absurdity which we thus successfully made apparent to the minds of some sagacious Potentate or Power of the Temple, the laudable resolution seems quickly to have been formed to correct the error we pointed out, More quickly indeed than successfully; for, assuming too hurriedly that the error lay in a misprint, and that it would be cured by substituting “*sudden green*” for “*sudden greens,*” the Power or Potentate aforesaid caused the ‘s’ to be forthwith erased in every copy in the church; thus, alas! sacrificing the purity of the text without curing the absurdity; for, sooth to say, Mr. Addison really wrote “with *sudden greens.*”

We might defend, perhaps, the poet of the eighteenth century for writing the phrase; but the *editor’s* judgment, in selecting the verse where it occurs for the purpose of having it sung in public worship now-a-days, is too ludicrous and characteristic to admit of one word of excuse being offered. A multitude of passages containing language obsolete, inelegant, or infelicitous, might be cited from our best poets; but no one with a grain of taste or sense would pick them out for a selection of their works, or parade them for a purpose for which they were neither necessary nor suitable.

We confess we feel great curiosity as to who it was who, missing the point of our remarks, rushed sacrilegiously into the church, and committed the new and worse blunder of corrupting Addison’s text, whilst he did not remedy the original folly. Some say it was the *editor*,¹ who felt compunction at the error, and devised sapiently the remedy; while others allege this could

¹ We mentioned in our last Number that this functionary was supposed not to have been a Benchet, but a committee formed of the Beadles and Bell-ringers. As this imputation on these officers is understood to have given them offence, and has been repudiated, it is but justice to them to say here, that we only referred to it as a rumour, and for ourselves we entirely exonerate them from the charge.

not be so, for that there never was an editor, the volume owing its origin to the process of "natural selection," as explained by Mr. Darwin in his recent treatise.

This controversy, however, is of no value to us; and we only mention this "sudden green" fact as an example of the encouragement which we ourselves derive from observing how willingly, though not perhaps wisely, any suggestion which we make in regard to the Inns of Court and their reform, is forthwith received. Thus stimulated to further effort, we propose now to consider another subject which the Bar generally is interested in—viz., the finance.

And here let us at once say, that no one who has taken the opportunity of examining into the matter, can for one moment profess the absurd opinion that the Benchers of any of the Inns of Court are guilty of corruption, or seek their own pecuniary profit to the disadvantage of the rest of the profession. The high personal honour and the social position for the most part of the Benchers of the Inns of Court, would forbid all possibility of suspicion of the kind here referred to, amongst the well-informed and respectable. But although the Royal Commissioners, appointed in 1854, to inquire into the Inns of Court, emphatically reported that they found no trace in any of the Inns of the misapplication of the funds to the personal advantage of individual Benchers, yet it is as difficult to believe that the estates of the Inns of Court either have been, or are economically managed, as that the main objects of these institutions have been observed, viz.: "The entertaining, education, and habitation of the students and professors of the law."

With respect to the proceedings of past generations of Benchers, we have little to say; they are only interesting to us in a financial point of view, so far as we have inherited the consequences of their systems and management, and as the traditions of their forefathers are weighing upon their descendants.

Confining ourselves for the present to the Temples, and to a period not earlier than the sixth year of James I., we find that at this epoch the two Temples accepted a charter, out of the

acceptance of which it is clear a *trust arises*. The clause in the charter which involves this trust, provides, that the said "Inns and Messuages shall serve for the entertainment and education of the students and professors" of the laws of the realm, residing in the same Inns for ever. The Inns of Court are not corporate bodies but voluntary societies, and the Benchers are trustees of the property of the society, held under deeds of trust which are executed from time to time. Until very recent times, the educational duties expressed in this deed were virtually neglected altogether. The sustentation of the students and professors was confined to providing them with dinners if they paid for them, and letting chambers to them at a sufficiently high rental. Indeed, so far as we can perceive (putting aside the mere social club relations of the Benchers), the chief duties undertaken by them for many years were those of letting lodgings, providing tolerable dinners for the bar and students, and sumptuous banquets for themselves. What they did in addition as church restorationists, we have already detailed in our last Number, and the trifling attempts made of late to provide legal education will be presently noticed. But their main duties, we repeat, as Benchers, were those of lodging-house keepers and tavern proprietors, and in neither capacity did they excel. The rent of chambers was and still is excessive; and there were (we hope we need not say there are) great abuses connected with the feeding department.

But latterly it may be said, the Benchers have been diverting some funds in establishing readerships and scholarships. Let us see to what extent. The contributions out of the funds administered by the Benchers of the Inner Temple towards defraying the expenses of *education* is, we believe, under £500; a like sum being provided by the Middle Temple and by Lincoln's Inn; Gray's Inn subscribing rather less. Each Inn adds about £50 a year for "contingent expenses." It is true that, besides these sums, fees are exacted from students on their admission for public lectures. The larger portion of the expenditure arises out of providing for the fixed "annual compliment" of three hundred guineas to each of the five readers.

The proportion of students' fees, which is allotted to these not overpaid gentlemen, does not come out of the funds of the Inns at all; and therefore need not come under our consideration at present. We may calculate the stipends of readers, the studentships (three of fifty guineas each¹), and contingent expenses, as costing each Inn about £500 per annum, exclusive of what is subscribed immediately by the students themselves for their education. The four Inns, therefore, together, contribute about £2000 a year out of the Societies' income for this important purpose, leaving the residue to be provided by an impost upon the students themselves. Is not this, we would ask, a miserably inadequate contribution for the purposes of legal education?

We may here observe in passing that one of the most probable means of making the scheme of legal education popular and successful, would be to increase the number and value of the scholarships. If these were made sufficiently tempting, the best men from the universities (who now frequently shrink from renewing examination perils) would be induced to enter for the prizes, and set the example to many others, who would profit by the study thus induced. It would be a legitimate mode of spending the money of the Inns, in the "education and sustentation" of scholars, if ten times the present amount were spent in establishing studentships and fellowships, varying in value from £200 to £50 per annum for five years.

Let us, however, now look at the general statement of the income and expenditure of the Inner and Middle Temple. We must take that for the year 1854, given in evidence before the Royal Commission. We would take a more recent return if it was to be procured; but, as we shall presently have to remark, the Benchers of the Inns of Court, though they confess themselves to be trustees, do not think it their duty to lay before their *cestuique trusts* an annual account of receipts and expenditure, or indeed to make any statement as to the property.

Turning, therefore, to the accounts of 1854, we perceive the following statement of the finances of the Inner and Middle Temple:—

¹ Tenable for three years.

INNER TEMPLE.

INCOME.			OUTGOINGS.		
	£	s. d.		£	s. d.
Rents - - -	15,227	0 3	Repairs - - -	-	-
Payments by Members	5,941	15 9	Library, &c. - -	-	-
			&c. &c. - - -	-	-
	£,21,168	16 0		£,15,945	0 10

MIDDLE TEMPLE.

INCOME.			OUTGOING.		
	£	s. d.		£	s. d.
Rents - - -	5,628	13 9	Repairs - - -	-	-
Dividends - - -	1,644	19 7	Library and Establishment	-	-
Sundries - - -	44	3 11	&c. &c. - - -	-	-
Payments from Members	2,874	13 4½			
	£10,192	10 7½		£,10,191	13 9

To the *general* statement of Receipts and Payments of the Honourable Society of the *Middle* Temple, for the year 1854, we will append a more detailed account of the items.¹

1854.	RECEIPTS.			PAYMENTS.		
	£	s.	d.		£	s. d.
Easements - - -	0	3	9	Library - - -	380	13 9
Contributions of the Inner Temple, for repairs -	6	0	6	Church, and Master's House - - -	248	10 0
Child and Co.'s Rent -	0	0	0	Revising Lists - - -	15	0 0
Lapsed Rents - - -	4	2	6	Coals and Light - - -	641	2 1
Rent of Chambers and Shop - - -	5618	7	0	Rates and Taxes - - -	773	0 3
Fines on Admission -	370	0	0	Insurance - - -	188	7 0
Fines on calls to the Bench - - -	331	0	0	Serjeant's Fee - - -	0	0 0
Duties - - -	1110	5	1½	Child deserted - - -	0	0 0
Options on Chambers -	16	16	0	Donations - - -	9	15 0
Readers - - -	42	0	0	Pensions - - -	260	0 0
Fees, Officers - - -	18	16	0	Law Expenses - - -	5	14 0
Dividends - - -	1644	19	7	Stationery - - -	32	2 3
Chamber Assignments -	0	0	0	Repairs - - -	2006	5 5
Interest, &c., on small Items - - -	27	7	11	Officers' Salaries -	3156	5 4
Auditors' Fine - - -	0	0	0	Cook - - -	1033	9 3
Commons - - -	1002	12	3	Robes - - -	1	10 6
				Servant's Allowances -	244	1 0
Total - - -	£10,192	10	7½	Total - - -	£9001	15 10

[Note.—This total, by the way, is not only wrong by £6, but is inconsistent with the abstract above.]

¹ In several particulars alterations have been made since 1854. The Returns of the Inner Temple are more creditable productions, but not so compendious.

The following is a list of officers' salaries in 1854 :—(Middle Temple.)

	£		£
Sub-Treasurer - - -	600	Bench Waiter - - -	30
Clerk to ditto - - -	150	Pannierman - - -	40
Library Keeper! - - -	150	Washpot - - -	60
Reader - - -	150	Chief Cook - - -	75
The Master - - -	70	Under Cook - - -	70
The Treasurer - - -	100	Head Porter - - -	70
Surveyor - - -	100	Under Porter - - -	60
House Steward - - -	150	Gardener - - -	60
Chief Butler - - -	150	Laundress - - -	22
Chief Bench Butler - - -	120	Warders (two) - - -	78
Puisne Bench Butler - - -	70	Watchmen (eleven) - - -	330
Assistant Bench Butler - - -	30	Waiters (fourteen) - - -	280
Bar Butler and Verger - - -	40	Assistant to Butler - - -	10
Puisne Bar Butler and Verger - - -	30	Rubbish Carter - - -	30
Assistant Bar Butler - - -	30		

"It is impossible," say the commissioners mildly enough, in commenting on these accounts, "not to feel some disappointment that such a large amount of gross revenue as arises from these Inns of Court, should have so small an available nett revenue; and, having regard to the great value of the site of these institutions, a *doubt arises* whether some mode might not be devised of rendering their property more productive, without departing from the purposes for which these societies were formed."

Although the absurd disparity between the valuable property of the Temple and the small "available revenue" which arises out of it, necessarily struck the minds of the commissioners, they were not able to suggest any remedy. They again mildly say—"The apparently large amount of rents received by Lincoln's Inn and the Inner Temple, and of rents and dividends received by the Middle Temple, might lead to the formation of an exaggerated estimate of the revenues derivable from the property of these bodies. The necessary outgoings, however, incidental to property of *this peculiar character*, are very large, and leave but a limited nett income to the Inns of Court." It is worth while to remark, that the investigation of the commission was by no means directed towards the economies of the Inns. They got certain returns, and heard the tale which the Benchers had always been told themselves—and probably believed—and there being no great patent waste, the commission was satisfied,

They did not consider that the very constitution of the body forbids the supposition that the affairs can be economically carried on. Even in the case of public commercial companies, where the directors are men of business, with large pecuniary interests at stake—their own as well as those of the shareholders, and where there is a chairman or managing director at the head with particular functions to perform in regulating the affairs of the company—we know, nevertheless, that latent fraud, negligence, and misconduct, oftentimes so flourish as to operate very deleteriously on property. The success of such associations depends chiefly upon the ability of the head or heads of the departments. If these have sufficient power and scope, and are made responsible, then the system of having a directorate may escape many of the evil consequences which otherwise naturally flow from it; but all important and complicated business ought to have the sole attention of competent and responsible persons addressed to it.

No constitution of a governing body could be worse devised than that of Benchers, so far as the purpose of conducting the *business affairs* of the Inn is concerned. "The peculiar character" of property of the Inns of Court, viz.: house property, requires a special activity. If well managed it yields a handsome return; if ill managed it is notoriously unlucrative. There is sufficient evidence in the report of 1855 to justify the opinion, that the properties in question certainly had not been, and probably were not then, under efficient management. We read of much in the Temple being in a "ruinous state"—of the large cost of repairing and keeping up blocks of buildings, and so on; but, if this subject had been fully inquired into, we are not rash in supposing the Commission would have heard that the property was unremunerative because buildings were not properly repaired and "kept up" soon enough; because others were patched up and had money squandered on them long after they were worth it; because in respect to outgoings and rentals, and the mode of setting to work to lay money out and get money in, the worthy Benchers and their servants had made more mistakes than even most other landlords who have been wont not to watch narrowly the

condition and prospects of their estates. It is worse than absenteeism, for the presence on the spot of the ostensible managers makes it appear that they acquiesce in all that is done.

The position, then, of the Inns is, that the members at large have their affairs committed to the hands of Benchers who affect irresponsibility as trustees, and who, as a general rule, are neither capable of managing or even understanding the duties which they undertake to perform. These duties, therefore, are committed to the hands of subordinates, who may or may not be very efficient persons, and who may or may not be allowed to perform their functions vigorously and beneficially.

With all these vices of irresponsibility, delegated authority, and ill-regulated agency, it would be miraculous if the pecuniary and other interests of the members of the Inns of Court were either protected or advanced. The treasurership¹ is an office held for a year, and the treasurer nominally has to superintend and transact various business connected with the Inn. If by luck he has the time and inclination to go through accounts and other details, or so much as are submitted to him, he has the opportunity no doubt of learning something which might be rendered useful, if he had not to quit the office forthwith, in favour perhaps of an overworked Attorney-General, who lets the Inn take care of itself, or of a venerable quidnunc, who potters about fussily, doing nothing but signing his name when he is told to do so. The appointment *by the Inner Temple Benchers* of an auditor, *on the part of the Bar*, out of the rank of stuff gownsmen, is likewise a farce. There are different kinds of auditing, and a skilled accountant may detect certain flaws, inaccuracies, or inconsistencies in the figures put before him; but for the purpose of reforming financial arrangements, and economically spending funds, even the best auditor, properly appointed and with full powers of investigation, would be of little use. Such an appointment of an auditor out of the ranks, is indeed a concession of a principle on the part of the Benchers, which, however, they could

¹ The treasurer of the Inner Temple receives £100. We do not know whether the other Inns afford fees or perquisites to their treasurers.

not well deny if so disposed ; for, whenever such an auditing on behalf of the bar has taken place, the bar has been thus declared to have a right to have a voice in the management of the funds of the particular institution.

There is nothing so destructive to the reputation of those who have been intrusted with money as trustees, or so detrimental to the successful issue of business committed to their hands, as secresy and irresponsibility. *The Bar must therefore require, and, if need be, insist on the annual publication of the accounts respectively of the Inns of Court.* This, whatever be the mode devised of reconstructing the Bench, must be done, and done forthwith. In many points, the "Masters of the Bench" would receive hints from those who are daily aware of the inconveniences and defects of the present system, if the facts connected with the expenditure were fully laid before them. If there is nothing to conceal, there is no reason for secresy ; but if there be any thing to conceal, the more urgent is the need for investigation and reform. How would the finances of the London and North-Western and Great Northern Companies fare now, if there had been no balance sheets published for the benefit of the shareholders ? If any paltry feeling of exclusiveness and dislike of interference should pervade the minds of the Benchers when called on to publish their accounts, and give an exposition of their stewardships, the remedy will then be in the hands of the barristers themselves. A general refusal to pay any dues and contributions, until a statement of their property was laid before them, would, we have no doubt, be attended with the desired result.

In the dispute between *Joddrell* and the Benchers of Lincoln's Inn, it would seem the court took a view favourable to the most absolute power of the Benchers ; but it is not *really* a decision which would affect barristers who should now refuse to pay demands made by their trustees, the Benchers, till they publish their accounts satisfactorily. The greatest sticklers for bad customs because they are old, would hardly contend that, if such publication had been made regularly by the last five or six

generations, the finances of the Inns of Court would be now in the crippled state as described.

There are, however, other offices and duties to be performed by the "heads of the houses" of law, than those of administering the funds and keeping up the establishments of the Inns of Court. They ought not only to represent the intelligence and the interest of the whole Bar, but have a living and actual—*i. e.*, the very opposite of what they now possess, which is an illusory—influence over its members. No one would contend for one moment for the propriety of investing any body of men with the power of vexatious meddling with the freedom of action of the members of the Bar. But if "etiquette," as it is absurdly called, be worth preserving, there should be some body possessing a right of declaring what are the rules which form such a code, which we often hear of, and most frequently from those who are supposed habitually to transgress the presumed law of professional honour. Perhaps the covetous overtrading of some learned counsel might then be a proper subject for consideration, as also the manœuvring after and grasping for business by certain of us, who, for the love of fees, undertake what they know they are not in a position to accomplish.

As at present constituted, we contend, the Benchers of the various Inns are not efficient for the commonest duties which they are presumed to perform; much less, then, would they be competent for the more important functions which would belong to such tribunals as we have been alluding to.

The staple out of which the Benches are formed is Queen's counsel; but they are self-elected bodies. In Lincoln's Inn, the number of Benchers amounts to sixty-two; in the Inner Temple, to thirty-nine; in the Middle Temple, to thirty; in Gray's Inn, to twenty-one. In all, there are one hundred and fifty-two Benchers. There are about one hundred and fifteen Queen's counsel. The ex-Chancellors, Vice-Chancellors, and other judicial officers, who remain Benchers after their promotion, together with a few honorary creations, and a sprinkling of stuff-gownsmen, account for the difference between the numbers of Queen's counsel

and of Benchers respectively. The majority of the latter take their seats on the Bench on being appointed Queen's counsel. Practically speaking, therefore, the Lord Chancellor creates the Benchers; and it has grown into an established rule, that the silk gown shall be accepted as the passport to the Bench. Occasional exceptions may be made to this rule, and it seems that Benchers *may* exercise the privilege of excluding whom they will, either from caprice, or an obedience to laws they themselves frame for this particular purpose.¹

One very flagrant case of exclusion from the Bench, equally unjust and absurd, has recently been perpetrated at Lincoln's Inn,² of which the following is a brief history.

¹ The well-known incident in Lord North's life, so capitally told by Roger North, bears upon this point very materially. He says—"Upon his lordship's being made of the King's counsel, there happened a dispute in his society of the Middle Temple, which ended favourably to him, and augmented his reputation in Westminster Hall. The rulers of the society, called Benchers, refused to call his lordship, after he was King's counsel, up to the Bench, alleging that, if young men, by favour so preferred, came up straight to the Bench, and by their precedence topt the rest of the ancient Benchers, it might, in time, destroy the government of the society. Hereupon his lordship forbore coming into Westminster Hall for some short time, hoping they would be better advised; but, they persisting, he waited upon the several chiefs, and, with modesty enough, acquainted them of the matter; and that, as to himself, he could submit to any thing; but, as he had the honour to be his Majesty's servant, he thought the slight was upon the King, and he esteemed it his duty to acquaint their lordships with it, and to receive their directions how he ought to behave himself, and that he should act as they were pleased to prescribe. They all wished him to go and mind his business, and leave this matter to them, or to that effect. The very next day, in Westminster Hall, when any of the Benchers appeared at the courts, *they received reprimands from the judges for their insolence*; as if a person whom his Majesty had thought fit to make one of his counsel extraordinary was not worthy to come into their company; and so dismissed them unheard, with declaration that, until they had done their duty in calling Mr. North to their Bench, they must not expect to be heard as counsel in his Majesty's courts. This was *English*; and that evening they conformed, and so were reinstated. It is one of the properties of an aristocracy, to hate that any person should come amongst them but of their own choosing. I have heard that, since the revolution, whereby (as they termed it) they were manumised, they have not called any of the King's counsel extraordinary (who are now become numerous) to the Bench, which shows the different walks some matters will take in different times."

² We purposely pass over the case of Mr. Hayward and the Inner Temple Benchers, not because it does not also illustrate an intolerably arbitrary feeling, and unfair mode of exercising the supposed right of calling whomsoever the Benchers will to the Bench, and excluding those whom they, or any clique or individual of them, object to, but because many years have elapsed since the occurrence of this disgraceful affair, and the conduct of the Benchers was so fully exposed and universally condemned at the time, that it would be now superfluous to recall the story.

Mr. Archibald John Stephens, the eminent ecclesiastical lawyer, and the well-known author of many learned books on ecclesiastical law, and other legal subjects, was originally a member of Gray's Inn. But in the year 1855, having been accustomed to resort to the library of Lincoln's Inn as a much richer repository of works on ecclesiastical law than that of Gray's Inn, and being annoyed by some new rules of the Lincoln's Inn Benchers for repelling from their library members of other Inns, Mr. Stephens migrated to Lincoln's Inn, and was admitted a member *ad eundem*, on the usual terms, paying the fines and fees, and removing his name from the books of Gray's Inn. At that time, and for many years afterwards, no rule existed at Lincoln's Inn affecting the right of members admitted from other Inns to be called in the ordinary course to the Bench when duly qualified. In June, 1859, Mr. Stephens was most fittingly created a Queen's counsel, and it was, of course, expected that he would be called to the Bench of Lincoln's Inn, according to the common practice. But when his friends of the Bench proceeded to move his call, it was found that, on the 26th of February, 1858, a small clique of obscure Benchers had met and passed a resolution, "that no person *who has been*, or shall be admitted *ad eundem* here, shall be eligible to be invited to the Bench until ten years after he has been so admitted." We call the authors of this resolution obscure, meaning in the sense of legal reputation, but some of them are better known than admired in other capacities. The chief, we are informed, was the person so notorious as the projector and author of the two "Big Bens," which cracked almost as soon as they were tried—as the abusive assailant of Messrs. Mears, the founders of the second bell, and as the defendant in their action for libel, in which he allowed judgment to go by default; and one result of which, if the Bench of Lincoln's Inn had been a well-ordered society, would have been his own expulsion from its governing body. Another of the more eminent of the clique, was Mr. John George Phillimore, the author of some impertinent

pamphlets,¹ &c. ; and a third was a County Court judge, to whom the decision in "My Aunt's Case" is usually ascribed.² On the discovery of this bye-law, it was moved in the first instance by V. C. Wood to invite Mr. Stephens to the Bench notwithstanding, and afterwards by Mr. Willcock to set aside the bye-law : both motions were supported by the most eminent Benchers of the Inn—the Lords Justices, Sir Fitzroy Kelly, Sir Hugh Cairns, and Mr. Montague Chambers ; but, altogether, they mustered only nine votes ; and the Bell Savage, the conceited pamphleteer, and the judge in "My Aunt's Case," leading nine others of the same stamp, outvoted the intellectual aristocracy of the Bench, and decided that Mr. Stephens should be excluded, and the bye-law remain. There are, as we have mentioned, upwards of sixty Benchers of Lincoln's Inn ; some of these are undoubtedly to be excused, by age and infirmity, from taking part in the government of the Inn ; but there are enough, and far more than enough, of able-bodied members to have outvoted the dozen who passed and upheld this disreputable bye-law ; and it is ill for the character of Lincoln's Inn that so many of its Benchers should not have thought it worth while to attend to their duty. As far as Mr. Stephens is concerned, the question is at an end ; for he has quitted Lincoln's, and been readmitted to Gray's Inn, and, much to the credit of the Benchers of the latter Inn, has been immediately called to the Bench. There are, however, several remaining members of Lincoln's Inn who were admitted from other Inns *ad eundem*, before the passing of the

¹ We may refer particularly to that on the Divorce Court, in which the writer's vanity, presumption, and bad taste, are conspicuous.

² As this case was decided some years since, and is not to be found, we believe, in printed reports, we may be conferring a service on our readers in preserving a record of it. The plaintiff sued the defendant for money due on an account stated, proved his case, and obtained judgment. Then the defendant pleaded that he could not pay, whereupon the Court inquired whether there was any one connected with him, within the limits of the statutes for the distribution of the personal estates of intestates, who could pay ; and upon the defendant replying that he had an old aunt who could pay well enough, only she didn't like it, the Court held the aunt liable, notwithstanding her dislike to pay her nephew's debts, and made an order on her to pay accordingly. If this was the fusion of Law and Equity now so fashionable, the result may seem to be Iniquity, and certainly should have been the removal of the judge from the Bench of the County Court, if not from that of Lincoln's Inn.

bye-law, and who therefore, if made Queen's counsel within ten years from their admittance, would be excluded by its retroactive operation from the Bench; and it is therefore possible that the question may again arise, but (unless the constitution of the Bench be altered in the mean time) with, we fear, little prospect of a more equitable decision than in Mr. Stephens' case. The principle of this bye-law is more pernicious than the law itself; for it amounts to this, that every barrister of every Inn is liable by retrospective laws, passed it may be, as in this instance, by an obscure clique of Benchers, to have his privileges of every kind, and to any extent, taken away, without his knowledge or power of intervention.

At the present day, therefore, it is clear neither the pecuniary nor professional interests of the bar are protected by the existing constitution of the Benches of the Inns of Court. The honour, the dignity, the learning and reputation of the bar should be represented by a professional court—whether called a Bench or no is immaterial. In such a body—important by reason of character and position—there would, we venture to say, be a power which might make itself felt in the preventing the jobbing of legal offices for political or personal purposes, and generally in asserting professional rights.

It may be said the instance just given of inequitable and selfish conduct is exceptional; but we say it not only illustrates, but affords a demonstration of the defective constitution of the Benches of the Inns of Court. And further, we trust it only requires to be known in the profession to bring about an immediate and total reform of these irresponsible and mischievous bodies.

ART. III.—*The Consolidated General Orders of the High Court of Chancery, with Regulations as to certain Fees and Charges.*
London: Stevens & Norton. 1860.

THE publication named at the head of this article has now been issued above three months, and has since the 10th of February last formed the only authoritative code of Chancery practice. There can therefore be but few members of the Equity branch of the legal profession who have not had occasion to look into it. The work has thus become so generally known, and at the same time is of so technical a nature, that it is hardly a fit subject for a review in the ordinary sense. We have no intention of encumbering our pages with an analysis of the subjects of the consolidated orders, or with criticism on the details of the execution of the work, concerning which agreement is scarcely possible. But we think that the occasion is a fitting one for presenting some remarks on the origin and authority of the General Orders, and on the practice of the court in bygone times as illustrated by these orders.

We have often wondered that those who have investigated the minute history of English families have not made more use of the records of the various courts, which are still extant, and especially of those of the Court of Chancery. A calendar was published, under the authority of the late commission on the public records, of the names of the parties to the bills yet remaining in the office which were filed during the time of Elizabeth, with some few of earlier date; and no doubt the originals have been often searched where the calendar indicated that the particular name would be found which was the subject of inquiry. But we venture to say, that the curious investigator of such points would be rewarded for his trouble, were he to undertake the labour of looking into the whole series of bills from the time when the published calendar ceases. It is well known how fruitful a mine of genealogical information is found in the reposi-

tories of old wills; and when we consider how large a part of the business of the Court of Chancery has from the earliest times¹ consisted of administration suits, we cannot doubt that the bills, decrees, and reports in those suits would be found to afford a vast amount of definite and accurate family history—qualities in which the experienced inquirer well knows the information derived from wills to be often deficient.

The learned and industrious author of the *Acta Cancellariae* seems to be fully aware of the importance, in this point of view, of the records under his charge; and in that work he has inserted several reports and orders on account of their genealogical interest.² Mr. Munro is, we think, the only officer of the court who has of late years shown to the public that he has indulged what he terms “the pardonable curiosity”³ to know something of the contents of such records, and we could have freely pardoned a larger indulgence of such curiosity. The *Acta Cancellariae* is a volume of singular interest to all who care for minute history, whether of the Court of Chancery or of English society; at the same time, the subject is so vast that no one life is long enough to exhaust it, and it is not the want of new matter that prevents the publication of many similar volumes.

The expression of the judicial voice of the court is variously termed a decree, order, decretal order, or dismissal; of these names *order* is the most general, and we shall hereafter use it alone, the differences of the four classes just mentioned being altogether immaterial to our present purpose. In theory, all orders are made verbally by the judge, and taken down by the registrar who attends the sitting of the court; but the minute made by the registrar in his day-book is mere evidence of the decision, and hence it follows that the breach of an order will be punished as a contempt, although it may not have been formally reduced into writing.⁴ After a convenient interval, the order is

¹ See the published Calendar, Vol. I., pp. 34, 39, &c.

² See particularly pp. 176, 221, 763, &c.

³ See Preface.

⁴ This principle is acted on in the case of injunctions. See 3 Atk. 567, 2 V. and B. 349, 2 J. and W. 264.

drawn up in due form by the registrar, assisted by the solicitors to the parties ; and the indorsements signed by counsel on their briefs are used as materials for this purpose, in aid of the registrar's own minute. The order thus drawn up is afterwards *entered*, by being copied at length in one of the books kept for the purpose, and the regular evidence of an order consists of a copy taken from this book.

Such is the procedure with reference to orders in private matters ; but the registrar's books above referred to contain other documents besides such orders. Thus, in the time of Lord Chancellor Bromley,¹ a speech made by him on the creation of some serjeants-at-law is entered in the registrar's book ; and, what is more to our present purpose, these books are, or until lately were, the authentic repositories of the General Orders of the Court.

Probably few lawyers of the present day are aware of the antiquity of some parts of the existing system of Chancery practice. It is generally supposed that the earlier proceedings before the Chancellor were of an informal character, depending in great measure on the personal influence of the judge ; and that there is some truth in this view would appear from the fact, that the number of bills filed to the end of the fifteenth century, is incomparably greater than the number of decrees which have been preserved, while few suits appear to have proceeded even so far as a written answer.² It seems, therefore, that a mere summons to appear before the judge, in most cases sufficed to secure to the plaintiff what he sought.

But it must not be supposed that the proceedings were destitute of all form. On opening the Consolidated Orders we find that the earliest order which it has been thought right to preserve, is of a date as early as Henry V. ; and this order, which requires the signature of counsel to pleadings, of itself imports a considerable degree of formality. It must be observed, too, that the order in question is taken from a compilation called

¹ *Acta Cancellariae*, p. 495.

² See the Preface to the printed Calendar.

Renovacio Ordinum Cancellariæ,¹ showing that such orders were no novelty at that time; and probably the procedure was regulated by general orders as early as the time of Richard II., in whose reign the extraordinary jurisdiction of the chancellor is generally supposed to have originated, or at least to have been greatly augmented.

These orders appear to have been made by the sole authority of the Lord Chancellor, and to have related to matters too trivial to have been noticed by the legislature. The authentic record of them consisted in the entry in the registrar's books, and doubts have been entertained as to the authority of any which were not so entered. This circumstance probably led to the practice of concluding every order with a direction to the officers to make the necessary entry—a custom which continued until the present year. No means were taken to ensure the publicity of any change in the practice of the Court, and the natural consequences ensued; doubts continually arose as to what was or was not the provision of an express order, and what was merely a practice which had grown up without authority. Judges, officers, and counsel, were equally at a loss, and equally liable to believe whatever doctrine suited their present convenience. As a case quoted from MS. in the absence of a printed report, was always on all-fours with that at the Bar,² so each side alleged the traditional practice to agree with his contention. Private enterprise did something to remedy the grievance. We need not allude to the various small books on Chancery practice which were produced in the course of the seventeenth and eighteenth centuries: the compilers of these seem to have trusted solely to the traditionary knowledge acquired by them in the conduct of actual business; references to the General Orders are seldom

¹ It is preserved among the Hargrave MSS. Sanders' Orders in Chancery. 7b. The order even recognises the "Chancery Bar." "Nullus scribens ad sigillum primum processum (videlicet) breve de subpna ad comparandum conficiat et ad sigillum producat priusquam billam cum manu unius *Consiliarium barram Cancellariæ frequentancium* recipiat et in filum cancellarie imponat." With "scribens ad sigillum" compare the Scotch "writer to the signet."

² If we are not mistaken, the Lord Chancellor somewhere notices this as an advantage enjoyed by counsel in bygone times.

or never found in them ;¹ but at last, in the year 1815, the first extensive collection of General Orders was published by Mr. Beames, who thus availed himself of the advantages derived from his official position in the court; the volume produced by him contains orders from the beginning of the seventeenth century, but does not profess to be complete, while no fixed principle seems to have been adhered to in the selection. A more extensive collection was published by Mr. Sanders in 1845, and his work has served as the basis of the present consolidation. His two volumes contain many orders which were of a merely temporary nature, or are now obsolete, and have only an antiquarian interest, which renders them of less practical use. We believe that no other collection has appeared which included the earlier orders.

Now, it is obviously improper that a work of this nature should be left to be performed by private persons. So to leave it is, in fact, to delegate to them the power of conclusively determining on disputed questions; for an order which these private compilers see fit to omit, ceases to retain any practical force. The want of an official written code of the practice of the court, and the evil of trusting to traditionary knowledge of the practice, have long been felt, especially so since the abolition of the Six Clerks Office, whither the suitor could formerly always resort for information; and accordingly attempts have occasionally been made to form an authoritative collection of the General Orders. We may especially notice the scheme proposed by Lenthall and the other commissioners of the Great Seal under Cromwell. Their plan embraced the consolidation of the General Orders, as well as a series of reforms in the practice of the court: a portion of it was upon the Restoration adopted by Lord Clarendon, but nothing effectual was accomplished until the present year.

We have said that we do not intend to enter on any minute criticism of the result of the labours of the consolidators—Mr. J. W. Smith and Mr. Cadman Jones—both of whom are well

¹ Lord Hardwicke speaks with some contempt of these books. 2 Atk. 22.

known to the profession by former publications. But the difficulty of bearing in mind and reconciling the mass of orders was becoming so intolerable, that any consolidation having the sanction of official recognition was sure to be received with thankfulness. Lord Chelmsford's tenure of office was short, and we do not know that the volumes in which Messrs. De Gex and Jones report his judgments will be so frequently quoted hereafter as some others we could name; but the report of the consolidators will long continue to remind practitioners that to Lord Chancellor Chelmsford they owe the lightening of their labours by the successful execution of this scheme.

But how long shall we continue to enjoy the advantages arising from the successful completion of the consolidation? Not for long, we fear. Two months have not elapsed since the code came into operation, and already it has lost its original completeness. Between the 6th and the 20th days of March, three issues have been made of orders and regulations, comprising respectively seventeen, forty, and five, distinct rules, besides schedules of forms and of costs. To incorporate these Rules in their proper places in the code, would be a work of no slight labour, and requiring no ordinary care. The experience of this month leads us therefore to fear, that the codification which has been accomplished will be of little more permanent use than were the labours of Mr. Beames and Mr. Sanders.

It is to be regretted that the scheme of the consolidation did not include some provision for giving permanent completeness to the code. The attention of the consolidators was called to this subject; but they did not feel justified in going so far beyond their instructions as to notice the suggestion in their report. Whether the advisability of some measure of this kind was overlooked by Lord Chelmsford and his successor, or whether it was thought that the practical difficulties of carrying it out were insuperable, we are unable to say; but there can be no doubt that, although the difficulties are considerable, they might be surmounted if the attempt were heartily made. A plan for the purpose has been devised by Mr. T. W. Braithwaite, the author

of the well-known work on the practice of the Record and Writ Clerks Office, with which his long experience has made him thoroughly familiar. Mr. Braithwaite proposes that the General Orders should be re-issued in a codified form at intervals of two or three years ; that General Orders and Regulations, issued during the intervals of publication, should be revised with the code by some proper person to be appointed by the Lord Chancellor : that obsolete matter should be expunged, and the new provisions inserted in the right place : that a copy of the code thus altered should be submitted to the Lord Chancellor and the other equity judges, together with notes of any decisions which may appear to have an important bearing on the General Orders : that the judges should then consider, and if they saw fit approve of, the alterations, and that a new issue of the code, to be printed from the copy so approved of, should then be made.

An obvious advantage of this plan is, that the new matter not yet incorporated in the code would at no time be of great amount ; while the principal, indeed we may say the only, objection that can be urged against it is on the ground of expense. How far the sale of the code at each re-issue would reimburse the expense of its production may be doubted ; although Mr. Braithwaite, referring to the instance of the Law List, is confident that the purchasers would be sufficiently numerous to prevent inconvenience on this head. We join with him, however, in the remark, that "upon this point the opinion of Messrs. Stevens and Norton would be more conclusive and satisfactory." But, whether these periodical re-issues would be entirely self-paying or not, the charges that would fall upon the fee-fund could not possibly be very heavy ; and the advantages of Mr. Braithwaite's plan in other respects are so great, that we hesitate not to say it ought to be adopted.

ART. IV.—THE LIBERTY OF THE FRENCH BAR.

IT is as fortunate a circumstance, we think, as it is an unexpected one, that nearly all the recent attempts made in France to acquire a larger amount of political freedom, have been made in conjunction with the representatives of the law. Hitherto, (as we sought to explain not long since in the pages of this very periodical,¹) attempts made in France to achieve freedom were lawlessly made. It is mostly against the law that they are combined and brought to bear. This time the case stands quite otherwise; and for the last eight months the enemies of despotism in France have been headed and led on by the men highest and most illustrious in the legal profession. At the present moment the French bar may be ranked as the most dangerous adversary of Imperialism.

This has come from no preconceived plan or scheme on the part of the members of the legal profession: it has come from a series of various causes and combinations; and, to give a true and comprehensive sketch of it, we must go back to the beginning of the year 1859.

When, after the Imperial speech to the Austrian ambassador on last New-Year's day twelvemonth, the French nation saw, with each succeeding day, that it was about to be dragged into a war which it repudiated with the very inadequate strength the constant pressure of despotism had left it, there arose, in the minds of many members of the Royalist and Republican parties, a notion that the time was come when some protestation ought to be, and really might be, made against the mere capricious will of the chief of the state. Against constitutional governments, and governments that condescend to reason with the "subject," and listen to his opinions, it is to be noticed that human perversity rejoices to employ violence. At all events, this is often the case in Continental countries, and has almost always been the

¹ Vide *Law Magazine* for February, 1860.

case in France; whilst against military and despotic governments, where reasoning is arbitrarily put down by the sword, reasoning is precisely the arm (and frequently the very powerful one) of the opposition parties.

The spot whence the first living spark of resistance to tyranny was emitted, was the time-honoured house of the Duc de Broglie. From the son-in-law of Madame de Stael, and from his family, came the signal of protestation. It passed unremarked; or remarked only by a very few, and uselessly. The son of the veteran liberal, the Prince Albert de Broglie, wrote in the *Révue des Deux Mondes*, and wrote in the *Correspondant*, upholding the principles of freedom so far as it actually was possible; but no one dared to rally round his standard except the small band of rigid constitutionalists who had never deserted that standard in its worst hour of need. *No new recruits came.* M. d'Haussonville, the Duc de Broglie's son-in-law, went about preaching the sacredness of the task of resistance to a despotic rule, but no convert was lured to his side by his arguments. Count d'Haussonville, however, would not give up the game: he had his "fixed idea," and he was resolved to act upon it. He did so, and he succeeded. To him is due the merit of the present movement, for it originated with him. Count d'Haussonville's "fixed idea" was, that in every constitution framed by man's ingenuity there is a loophole at which its enemy can creep in, in order to attack it *from the interior*. His hope was to obtain more liberty by strictly legal means; to force the now existing institutions of Imperialism to yield fruits, whereof they knew not that the germ was within them.

The first opportunity for doing any thing of this kind was afforded M. d'Haussonville in September last, by the declaration in the *Moniteur* that "freedom of the press did exist in France sufficient to answer the purpose of all good citizens." It was declared by the official journal, that no further freedom of expression need be desired than what already existed, for that it was already allowable for every one to criticise the acts of the government, of the ministers, and others, so long as he should remain

within the limits of fair discussion, and not use his pen merely as a weapon for factious purposes.

Count d'Haussonville immediately wrote a letter to the *Conseils Généraux*, which letter was published in the weekly paper entitled the *Courrier du Dimanche*. In this letter the writer blamed openly the way in which the war had been commenced against the will of the country, asserted that the advantage of parliamentary institutions lay precisely in the fact of their making such capricious enterprises impossible, and went, in forcible though polite terms, to the extreme limit of "fair discussion," calling upon the *Conseils Généraux* to act, to use the power awarded them by the existing constitution, and to press upon the government so as to render purely arbitrary action more difficult. The situation was a delicate one: the government had at that very moment affirmed that it did not fear discussion; and here was a man—a very considerable man—taking it at its word, and opening a discussion with it! The government let the attack pass. The *Lettre aux Conseils Généraux* came out: it was reprinted in the form of a small pamphlet, and circulated all over France, all over Europe. Not a month after, the same journal, the *Courrier du Dimanche*, contained another curious document, a short pithy letter signed by M. Villemain, in which the ex-minister of Louis Philippe, perhaps the most uncompromising constitutionalist of all, boldly uttered the word "Legality," and said France was living in a state of "lawlessness!" Here was the whole truth out at once! For this is the truth. Villemain went straight at the evil at once, and without flinching. "The fault lies," was his argument, "in the absence of judicial action in the so-called sphere of justice. Law being applied, not judicially but extrajudicially, *administratively*." This hit home; and against this theme, admirably handled as it was by M. Villemain, the government had no counter argument to employ. They possessed but one arm—force: this was resorted to, and the *Moniteur* warned the opposition to "hold its peace" henceforth. But M. d'Haussonville returned to the charge, and now came in November the famous "*Lettre aux Bâtonniers de l'Ordre des Avocats*," which

first claimed the association of the bar of France in the work of obtaining political freedom for Frenchmen.

"The *Moniteur*," says M. d'Haussonville, "has spoken; and has spoken in order to say that the government did not intend to change the existing order of things, whether by the intervention of a decree, or by purely legislative means. We are told by the government organ, that we must be satisfied to remain where we are, shut up in the circle that is traced out around us. The sentence is a severe one, for the space is small, the barriers high by which we are hedged in; but so let it be—let us respect the sentence, such as it is, but let us study carefully the ground that is left to us. When we have studied it well, if we personally find it is so parcelled out as to render all movement on our part impossible, we will then turn round, and addressing ourselves to legal men—our masters in such matters—we will ask *them* if there can be found no *lawful* means—if they, as lawyers, can devise no *legal* manner of *legally* widening the space in which we are confined, and setting at a somewhat farther distance the barriers which press in upon us so closely."

Here was the idea started at last, from which, since then, the whole new system of recent opposition in France has been derived. No one had dreamt of "legal resistance" to despotism; Frenchmen are unaccustomed to think of "legal resistance" to any thing: there has been either a partial and vague longing for some violent opposition which should overthrow the existing form of government altogether, or a very general feeling of discouragement at the notion that all such opposition was impossible, government having at its own disposal an amount of force infinitely superior to any thing its adversaries could attempt to array against it. There had been dreams of the successful insurrection of 1830, of the "*surprise*" of 1848, of armed attacks, and even of lucky chances of more criminal enterprises, but of a quiet resolute resistance *from within* by a *legal* action, there had never been an idea. M. d'Haussonville's scheme so thoroughly possessed every man who read it with astonishment, that not a few imagined he had actually taken leave of his senses, and they were inclined to

treat his "*Lettre aux Bâtonniers*"¹ as the product of a diseased brain. But M. d'Haussonville went very methodically to work, and soon discovered in the constitution of the Empire itself the loophole he required, the breach whereby he could introduce an enemy into the very innermost interior of the works. After a very eloquent preamble, in which the glaring inconsistencies of the Imperial government were treated in no admiring terms, but still with moderation sufficient to make the publication possible, the writer proceeds to examine the bearings of certain clauses of the so-called *constitution* of the state as it now exists in France. He sets forth, under the head of "*Article 45*," the following:—

"The right of petition may be exercised with respect to the Senate"—(Art. 25 having previously stated that the "Senate has the guardianship of all public liberties;") and he records the act which says, "No petition can be sent up to the legislative body." This being once set down as forming part of the *Pacte* established between the nation and its ruler, it being formally recalled that the Senate—both under the first and second empire—is to be charged with the supreme duties of correction and revision, M. d'Haussonville proceeds thus:—

"Here lies the path of legal procedure open before us; its name is *right of petition*. This is our right; we *have* the right of addressing the Senate; it is vouchsafed us to petition the senatorial body. Unluckily, that thing so valuable in political life—the thing known under the name of a *precedent*—fails us here altogether. We have no precedent, and can find none. No tradition relating to this subject has been handed down from the first to the second empire. The now existing constitution is, in great part, modelled on the constitution that subsisted until 1817, whilst this had in turn borrowed immensely from the constitution of the year VIII. All these several and successive constitutions were always unfortunately better obeyed than studied, better submitted to than known, by those to whom they were granted, and better known than observed by those who granted them."

¹ Bâtonnier is the title of the Barrister elected every two years to preside over the council of the order.

Notwithstanding this difficulty, however, Count d'Haussonville resolved to stand on his discovery, and loudly claim the right of petition. His principle was, that no one (not even a despotic sovereign) can escape the pressure of his time, and he took up his ground with determination. "It should never be objected," he says,¹ "that all efforts are useless; that no discussion does any good; that no debating modifies any one; and, above all, does not modify the potentates of the world. *This is not true.* The world's masters live, after all, in the world they govern, and do not shut themselves up in any imaginary universe. . . . You need not say, 'The Emperor has been forced by public opinion into doing this for the Moldo-Wallachians, and this for Italy, but he will not do it for us;' you need not say that, for it is not so; *the Emperor will also do these things for France, when France shall determine on their being done.*"

The form in which M. d'Haussonville wished the national resolve to become visible, palpable, *real*, was the form of *right of petition*; the right for French citizens to petition the Senate, and demand from that body such an intervention with the supreme authority as should procure greater latitude for the public expression of thought. M. d'Haussonville aimed at obtaining *legally* increased freedom of the Press, and at securing for so called "Press misdemeanours" a strictly judicial, not an *administrative* examination and punishment. The way in which he puts his propositions is as follows:—

"The more I feel certain of the justice of our cause, the more I hold to its triumphs, the more I fear its being compromised by any mistake in detail. So few petitions have been addressed hitherto to the Senate, that the mode of exercising the right thus to address it is as uncertain and doubtful as the right itself is formal and positive. For this reason we must invoke the opinion of those experienced men who have helped in the formation of all our laws and institutions, and have made them the objects of their constant and special study. To these men we put the questions here noted:—

¹ *Lettre aux Bâtonniers*, p. 39.

"1°. Every French citizen in the enjoyment of his political qualifications, has he not, according to the terms of the constitution, the right of demanding from the Senate, by means of a petition, any modification he may regard as useful to the now-existing laws?

"2°. In addressing himself to the Senate by means of a petition, and according to the express terms of the constitution, every French citizen (qualified as is above stated) has he not also the right to explain in what way the legal measures whereof he solicits the modification are, in his opinion, prejudicial, or contrary to the recognised principles of 1789?

"3°. The *Thirty-second Article* of the decree of the 17th February 1852,¹ is it not, in many of its bearings, contrary to the principles of 1789, and particularly to the principle of the inviolability of property?

"4°. The right of petition being, under the reign of the dogma of popular sovereignty, and under the exercise of universal suffrage, one of the most essential guarantees for the execution of the national will, ought not considerable latitude to be left (within the limits of course of public order and peace) to the exercise of a right so very important?

"5°. Is it forbidden by any now existing law to reproduce, in the form of a pamphlet (subject always to the ulterior action of the tribunals), an article, or other written paper, which, in a journal or review, would have provoked a *warning* from the government?

"These questions are not officially submitted to the *Bâtonniers* of the order of barristers, because they have not, in that *presidential* capacity, any opinion to give upon legal points of controversy; but, as the elected chiefs of so considerable a body in the state, they are here entreated to recommend the study of these five points to their colleagues. It is needless to add, that if there are a certain number of people desirous of never violating any of the *laws of the land*, and at the same time of knowing most positively and minutely what these laws really are, their real

¹ This is the decree which establishes the actual press legislation in France.

reason for wishing to obtain such practical knowledge is, that when they shall have obtained it, they are resolved to act upon it, and, if never to *infringe* a law, to *use* it to the very utmost for the purpose of ameliorating the condition of the country."

So far M. d'Haussonville.

When this "*Lettre aux Bâtonniers*" appeared, a "warning" had just been sent to the "*Correspondant*" for an article of M. de Montalembert's, and it was a few days later followed by a "warning," inflicted on the *Courrier du Dimanche* itself. This newspaper was warned for the very publication of the document we have quoted above. M. Billault had replaced M. le Duc de Padoue as minister of the interior, and a reign of terror was inaugurated for the French newspaper press. The Bar rather stood on the defensive; rather hung back; and it was thought M. d'Haussonville's appeal would prove abortive. Nevertheless a sketch of a "legal opinion" was drawn up; it was whispered that all the leading lawyers in Paris would sign it; and, hearing this, the members of the Bar, in various provincial cities, wrote letters without end, to inquire in what manner they could add their signatures *en masse* to those of their illustrious metropolitan colleagues. Political causes now added a fresh complication to other pre-existent ones, and the so much talked of "consultation" did not seem destined to see the light. The chief political cause that prevented it was the absence of a good understanding between the several parties that compose the *Opposition* in France. The men whose opinion was asked were representatives of political creeds, any fusion between which was supposed to be impracticable. Amongst them were Plocque, the present *Bâtonnier*, a republican; Berryer, an ardent royalist, and faithful servant of the elder branch of the House of Bourbon; Marie, the ex-minister of the republic of 1848; Dufaure, the minister of the interior of 1849, an Orleanist, who had been Cavaignac's confidential friend; Lionville, a fusionist-monarchist; and Bethmont, a constitutional republican.

The "fusion" that had not been brought to maturity between the heads of the royal family of France, between the princes at

Brohsdorf and at Claremont, could not now be accomplished between their partisans and the partisans of the various points of government recommended to the attention of the French people. The unfailing answer was: "Why should we sign this 'consultation'?" "Who will profit by it? We see clearly enough whom all this works *against*; we do not see at all whom it will work *for*. It works *against* the empire; but does it militate in favour of a republic or a monarchy? And if of a monarchy, which? that of the elder or the younger branch?"

These were the perpetually recurring questions, to which no one could give a satisfactory answer; and there the entire matter rested. It was generally supposed that the "*Consultation des Bâtonniers*" would remain unsigned, and that the excellent "cry," raised by Count d'Haussonville, of "Right of Petition," would die out without having awakened any echo in the country. A great mistake committed by the government authorities, changed the position in four-and-twenty hours.

As we said, the substitution of M. Billault for M. de Padoue, as minister of the interior, had been the signal for the establishment of a perfect reign of terror, as far as concerned the press. Hardly a day elapsed without some newspaper being "warned," or some pamphlet seized; and, amongst others, an action was brought against a writer of the name of Vacherot, for an article entitled *La Démocratie*.

M. Vacherot chose for his defender Emile Ollivier, the most rising barrister in France. M. Ollivier is a young man of advanced opinions, whose father, Démosthène Ollivier, made himself somewhat conspicuous in 1848, as one of Ledru Rollin's "provincial commissioners." At the last Paris elections Emile Ollivier was one of the five or six violent opposition candidates chosen and returned in defiance of the Imperial government. His *plaidoirie* in defence of M. Vacherot was exceedingly eloquent, and not held to have overstepped the ordinary limits of free defence. The presiding judge, however, was not of this mind, and he throughout lost no opportunity of making the position of the counsel for the defendant as difficult as he could. At last M. Ollivier, irritated

beyond his bearing, lost patience, and accused the Bench of "want of impartiality," and of "appealing to the worst and narrowest of political prejudices and passions."

Stung to the quick, the presiding judge, without taking time to reflect, responded to M. Ollivier's well-deserved attack by an instantaneous exercise of his arbitrary power. He, then and there, pronounced the suspension for three months of M. Ollivier from his functions as a barrister, and issued the order to M. Vacherot to provide himself with another counsel, postponing the further hearing of the cause for one week.

The effect of this ill-advised measure was an immediate one. That same evening, the entire "Council of the Order," as it is termed, met together, and it was resolved to resist the tyrannical action of the Bench—prompted, as was imagined, by the central authority. The first determination taken was to appeal from the sentence just issued; and this was instantly done. Every difficulty was thrown in the way of this mere formality, which was, however, accomplished in the end. Before entering into the details of the form of resistance adopted, let us state that from this mistake, committed by the authorities, dated the energetic opposition of the bar of France to the government; for this mistake it was that produced suddenly a complete fusion between all its members.

When once the appeal against the sentence of the President of the "6^{me} Chambre" had been duly lodged, the whole council of the order of barristers began to debate as to the mode in which the appeal should be conducted. There were two ways of proceeding:—one was to provoke the hearing of the appeal before what are termed "*Toutes Chambres Réunies*;" the other, to carry it simply to the *Court of Appeal of Correctional Police*. The reason for hesitation between the two was, that each had its advantages counterbalanced by disadvantages. In the first mode of proceeding before the *Chambres Réunies*, there might be a chance of a reversal of the sentence, of which it was well known there was none were the appeal simply carried up before the "*Cour d'Appel de Police Correctionnelle*." A few words will explain this. The diminution of the original sentence in M. de

Montalembert's case, by this very *Cour d'Appel*, had so incensed the government, that it had taken, only very lately, the surest possible means of preventing any repetition of such an event. From the presiding judge downwards, every one in the said *Cour d'Appel* was a devoted Imperialist, who knew how completely his preferment depended on his zeal. Before this court, therefore, it was felt that there could be no possible likelihood of seeing the sentence of suspension passed upon Emile Ollivier reversed; but there was an advantage attached to a trial in this court, which would fail an appeal brought before the *Chambres Réunies*—there was the advantage of publicity. A cause heard before the *Chambres Réunies* is heard *à huis clos*, as it is expressed; whereas, whatever was brought before the *Cour d'Appel de Police Correctionnelle*, would be public. So, in the one case there was the possible chance of a reversal of the sentence, but in silence; and, in the other, there was the advantage of a public *exposé* of the complaints of the bar against the government, though there could be no hope of the diminution of the penalty.

The “*council of the order*,” after mature deliberation, though much against the advice of many of its leading members, decided in favour of a hearing before the *Chambres Réunies*. The “*order*” had, however, counted without its host. The *Cour d'Appel* declared its competency, and preferred a claim to the right of judgment in the Ollivier case. A previous trial as to the competency or incompetency of the court of appeal had to be held, and the decision was in favour of the competency of the court. Next came the trial before the Court of Appeal, of M. Ollivier's demand for the reversal of the original sentence passed upon him by the president of the 6th chamber.

Whilst these discussions were pending, the “*fusion*” of all parties in France opposed to the imperial government had spontaneously started into being. When meeting together for the purpose of settling the most efficacious mode of resisting what was regarded as an outrage upon the whole bar of France *as a corps*, the members of the Parisian bar quickly perceived that,

however much politics might divide them, their tendencies, feelings, and interests, *as an order*, made them *indivisibly one*. Outraged in the person of M. Emile Ollivier, an "advanced liberal," but their "*colleague*," the variously-minded individuals of the council, looked each other in the face, and recognized the one great truth, that the conduct of the government officials united them all against the government, and as component parts of a class. Amongst other examples of this "fusion," the following may serve. During one of the discussions we allude to, a young and very ardent ultra-royalist barrister exclaimed:—"As for me, I acknowledge, and am ready to uphold, all the principles and liberties of 1789." Instantaneously, Jules Favre, one of the first judicial orators in France, but a republican so uncompromising that he has been styled a "red," sprang forward and replied:—"And I am ready to defend the pope, and go all lengths with the papacy against the empire!" The anonymous imperial brochure had just appeared, and when it is recalled that Jules Favre was the defender of Orsini, the importance of such a declaration as that above mentioned will be duly appreciated.

The question as to whether the *Cour d'Appel de Police Correctionnelle* was or was not competent to try the Olivier cause, was submitted to a higher court; but, while it was yet undecided, the fusion of the several parties composing the bar of Paris was complete. We might say the bar of France; for, as before mentioned on the previous occasion, adhesions poured in from all provinces in France.

Before the decision could be given in the case of Emile Ollivier, the Paris bar, however, now resolved to prove to the world out of doors how perfectly united it was against the arbitrary and despotic action of the government. The "*Consultation des Bâtonniers*" was referred to, and the cry of "Right of Petition" at once adopted. In the very first days of the new year was published the document whence dates the first attempt, made by French citizens under the second empire, to reconquer some portion at least of their former liberties and rights. The attempt, let it not be forgotten, was a legal one, and was made and headed by the foremost legal authorities in the nation.

A fresh question, however, had been started, which connected the immediate interest of the famous "Consultation," especially with the fifth point put forward by M. d'Haussonville in his "*Lettre aux Bâtonniers*." The newspapers in which this letter had been printed, having, as we have said, been "warned" for the fact of printing it, and his own printer having negatived M. D'Haussonville's demand to reprint and reproduce, as a pamphlet, a statement already reproved by the government, the one chief point to be settled was precisely that which specifies the uncertainty as to *whether* a printer be or be not justified in refusing to reprint a *warned* document. This constituted, at the end of December last, the immediate and vital interest of the case. We will summarily sketch out the substance of the opinions given by the *Bâtonniers* on the several points submitted to them, because they clearly show the unanimity of French legal men as to the *illegal* way in which the government of the empire is brought to bear upon the country.

As to the fundamental "right of petition," the reply is this:—"Rationally, honestly, and legally interpreted, the right of petition—a sovereign right originally in its objects and results—can have no limits save those we have specified; it is a right granted to *attack any existent law whatever*, which threatens, compromises, or violates the great national interests that the constitution is bound to uphold, to confirm, and to guarantee; it is also the right to propose or support any idea of reform that the advance of the age may render advisable. The right of petition is all this, or it is a deceit."

On the third question, that of deciding in how great a degree the decree of the 17th February 1852 (regulating the French Press legislation), "carries out the genuine principles of the constitution of the empire," the answer was one striking at once at the habitual application of the Imperial will in matters where the public expression of the public thought is concerned. In the face of so many arbitrary acts, which are in reality downright confiscations and spoliations, the *Bâtonniers* have the courage to say that such applications of the law are *illegal*, and to establish

that here, more than elsewhere, "right of petition" ought to be exercised; for, say they:—

"The Senate is represented by the constitution *as opposed to the promulgation of laws which subvert the principle of the inviolability of property.*"

This was perhaps the very hardest stroke dealt the Imperial government.

Now, upon the fifth point the opinion of the Bar is unhesitating. The first line of the reply as to the "right of demanding reproduction of a warned document," is as straightforward as it well can be. "The right of reproduction appears to us incontestable." Upon all the fundamental points, therefore, it will be seen at once that the chief legal authorities of France were of one mind with M. d'Haussonville; but the "Right" implied by his last question—the right namely of "reproduction"—was one which carried with it the necessity for the decision of the tribunals: M. d'Haussonville summoned the printer who refused to print the "warned" document, before the Tribunal of Commerce, and the sentence was given in favour of M. d'Haussonville, and against the printer. This took place on the 20th January of this year. Since that date, therefore, the position of the Imperial government, with regard to the public expression of thought, is in so far modified, that notwithstanding any censure of a document, conveyed in the form of a ministerial warning, such a document can be "reproduced," and distributed *ad infinitum*; and that, to prevent its being so, the government must be prepared to go the length of a public action at law, brought against the writer of the document, a proceeding of problematical success, and of certain disadvantage in other respects, as has been demonstrated latterly in France, by repeated *procès de presse*.

It must be added to this, that the "*Consultation des Bâtonniers*" was adhered to spontaneously by all the independent and most distinguished members of the provincial Bar throughout France; so that the antagonism of the bar and the government was, and is, a fact that no one can deny. So little can it be denied, that it was for a short time sought to adopt the

severest means of punishing the order of barristers. Nothing less was talked of than "suppressing the entire order," and placing it on the same footing with the *Avoués*, *Notaires*, and *Agents de Change*! Wiser counsels, however, prevailed, but the barristers of France are not conciliated, or likely to retreat upon a path they have opened up already with such *éclat*.

We will now revert to the Ollivier cause, and to the further opportunities it engendered for proving the practical "fusion" between all the parties of the legal profession. It was decided that Emile Ollivier should come before the *Cour d'Appel de Police Correctionnelle*, in which all the benefits of the completest publicity were vouchsafed to him, but before which he could indulge in no possible hope of obtaining a reversal of his sentence. The trial came on, and M. Ollivier appeared, attended by M. Plocque as his defender, simply for the reason that the latter happens to be the *bâtonnier* of the order of barristers for the present moment. But with M. Ollivier the whole council of the order walked into court, and about a couple of hundred *avocats* belonging to the Paris bar followed them. As many more would have joined themselves to these if place could have been found, but the "public," properly so called, had its rights; and, however much the members of the bar might press their claims, the persons to whom entrance tickets had been delivered by the authorities, were by no means disposed to give up theirs. The crowd was immense, and the interest felt in the trial universal.

It is needless to say that the sentence was not reversed by the *Cour d'Appel*; but that part of the question was yet to be definitively settled, for a second appeal from this court to the Court of Cassation has been made, and the final decision of this supreme tribunal is not yet published. But the one great fact proved by M. Ollivier's *procès*, was the fact of the continuation of the "fusion," to which we have more than once alluded. At this *procès* all party divisions clearly showed themselves at an end, and the men of the hitherto most bitterly opposed factions, sat down side by side, shaking hands cordially with each other, and resolved the spectators should perceive how united they had become.

One of the assistant councillors, who occupied a seat on the bench near the presiding judge, said afterwards to a friend of his—"I was astounded at what passed, and when I saw Berryer and Jules Favre standing engaged in evidently sympathetic converse, I had a vision of the 'fusion' having become incarnate, and rising up visibly, palpably, before my eyes."

The sentence arbitrarily passed upon Emile Ollivier by the president of the 6^m *chambre* was, as we have said, maintained by the Court of Appeal, and followed by a second *Appel en Cour de Cassation*, still pending. But the Bar was destined to manifest still further signs of opposition to the government, and to prove still more strikingly, how thoroughly united among themselves were its members of all parties. Jules Favre's words of—"I will go all lengths with the papacy," were to be in a measure fulfilled.

Here, again, a few words of explanation are requisite. When, in the autumn of last year, it became clear that the Emperor of the French inclined towards a more independent policy in the Romagna, the clergy of France began to take alarm, and the Bishop of Orleans published his first "Letter to a Catholic." This was replied to, but with unfortunately too little talent, by an anonymous writer in the *Constitutionnel*, a semi-official organ. The bishop had evidently the best of the discussion, when, early in the winter, the same journal bethought it of printing a warmly *Bonapartean* document, emanating from a *former* Bishop of Orleans; and the way in which the document was brought forward made it seem at the outset, to the unreflecting public, that there was produced a contradiction of his own opinions by the *present* bishop. Upon this the present bishop published, not only a protest as far as he was himself concerned, but a haughty and severe condemnation of the man who had counted as one of his predecessors in the episcopal see of Orleans. Not only did M. Dupanloup declare *he* was not the priest who had found it ever convenient to tender his allegiance to a despotic sovereign; but that the man who had done so was unworthy the title of priest, or the repute of an honest man. By the aid of irrefutable documents—some manuscript, some printed—M. Dupanloup showed Bishop Rousseau to

have been one of those individuals whose support can be of small service to any cause to which it may happen to be tendered.

In the clergy there were differences of opinion as to the advisability of this new "Letter" of the bishop's; but where it met with an enthusiastic welcome was in the Bar. There was no dissentient voice among legal men in Paris as to the morality of M. Dupanloup's condemnation of Bishop Rousseau, or as to the beneficial effect it was likely to have on public opinion.

The government, however, was the aggrieved party, and began to devise some means of exercising an action against the bishop. The minister of public instruction—a man extremely ardent in all these quarrels, and second only to his colleague of the interior in his deadly desire to wield tyrannical sway over the press—the minister of public instruction hit upon the notion of a *procès en diffamation*, to be brought against M. Dupanloup. The hint was obeyed; but the plaintiffs had to be found. These M. Rouland is reported to have discovered; and a gentleman, belonging to the corps of avoués of Paris, had the satisfaction of refusing to be a party to the scheme of attacking the Bishop of Orleans. This gentleman had married a grand-niece of Bishop Rousseau, and, therefore, represented the family of the man whom it was sought to drag forward as "defamed." Now, this grand-nephew in-law belonged to the opposition, and at once declared his determination not to aid or abet any manoeuvre for attacking the Bishop of Orleans. The ministerial efforts were next turned towards an old lady nearly ninety, half paralytic, and who resided in a village near Paris. This lady, the widow Bertin, was at last persuaded, in her quality of niece of Bishop Rousseau, to lend her name to the action for libel. She did so, and having once done so, her next of kin joined her; and the Bertin family were secured, after a good deal of trouble, as plaintiffs. Next, it was deemed fitting to associate the proprietors of the *Sidcle* to the complaint, and a double action was instituted against M. Dupanloup; one for having libelled Bishop Rousseau, the other for having libelled the *Sidcle*. At once, all the highest legal authorities gave it as their opinion that no action was possible, for that

neither a dead person nor a society could be "libelled." The *Siècle*, it was said, was an abstraction, an association, and could not be held to be calumniated, or to have suffered any damage; and Bishop Rousseau, it was said, was subject, like every other public functionary after demise, to the judgments of history. The entire Bar went with the Bishop, and gave its opinion, whenever asked, against the government. Still, this was a political case, and the authorities were resolved upon a course that should vex and compromise M. Dupanloup.

It must be premised that, *à priori*, the Bar is nowhere in France at all *clerically* or papistically disposed. In ordinary times it would lean from, and not towards the church. But these were felt to be no ordinary times, this no ordinary question, and the prelate was here regarded as serving the cause of liberty, and opposition to the empire. For these reasons the Bar went with him. M. Dufaure, who had been one of the shareholders of the *Siècle*, and who was conspicuous as a republican, and the *fidus Achates* of General Cavaignac—M. Dufaure asserted loudly his desire to head the attack against the "*Siècle*;" but the very fact of his so loudly saying this put the authorities on their guard, and the whole order of the procedure was suddenly and at the last moment altered; and, the case being divided into two distinct parts, M. Dufaure found himself charged with repelling the attack of the Bertin family, while that of resisting the complaints of the "*Siècle*" devolved on Berryer.

Before the preliminaries of the trial were arranged, the clear proof of how far the "fusion" had gone had yet to be given. Upon the first news of what was expected by the government from the "*Siècle*," the proprietors of the revolutionary journal had at once applied to Jules Favre to act as their counsel. Favre had been time out of mind their own man, absolutely and exclusively. It would have been as unnatural that Favre should not act with the *Siècle*, as that Berryer should act against a Royalist. At the outset Favre allowed it to be supposed he accepted; but by degrees, as light was thrown upon the whole affair, and it was seen against whom it would be his province to plead, he retired,

and ended by throwing up his brief. He acknowledged the impossibility of reconciling his behaviour in the Ollivier case with the conduct of that of the *Sidcle* and the Dupanloup proceedings. The political exigencies of the moment counterbalanced all others, and Jules Favre would not plead against Berryer and Dufaure, with whom a month before he had gone hand in hand. This is a *great fact*, only not sufficiently talked of, because such deep silence presses down every thing in France.

Jules Favre having withdrawn, it then remained to supply his place, which was found to be no easy matter. All barristers of any note refused, and in the end the services of only a very second-rate man could be secured, and M. Lénard was opposed to M. Berryer. Although the latter was suffering from a severe illness, and his opponent had employed three hours to develop the grounds of his attack, it was evident the *Sidcle* had not a leg to stand upon, and must be defeated. The trial lasted four days, the interest of the public augmenting with every hour. Notwithstanding the extraordinary efforts made by the authorities to circumscribe the number of the spectators, there were present about 180 persons belonging to what is termed the "general public," exclusive of the members of the legal profession.

On the first day, M. Lénard, as we have said, in a speech that lasted three hours, did his utmost to show the "*Sidcle*" calumniated and injured. The *plaidoirie* by which Berryer answered was unusually short (not exceeding an hour and a quarter), but his arguments were thoroughly victorious. It was at once felt that what all the foremost lawyers in France had given as their opinion would be acted upon, and that it would be found impossible to prove that an "abstraction," such as a newspaper (no proprietors or writers of which were nominally even alluded to), could be held to have suffered damage from any thing that might be said of it.

On the second day Dufaure had to repel the attack of the Bertin family, and this was even more glaringly victorious than the achievement of the day before. Dufaure took up what was denominated the "historical plea;" that is, he laid it down as un-

deniable that no dead man could be "calumniated," for that, if the mere statement of the deeds of a dead man were to be held to be calumnious, the existence of history would be at an end.

We must explain what is understood by "calumny" in France:—

Where living individuals are concerned, no plea of the truth of a libel is admitted; so that, in an action for libel, the defendant has little or no chance, if, having really made the damaging statement (no matter how true it may be), it can be brought home to him. It has never been the creed of French jurists that false statements could be made touching a dead man, and the opinion generally is, that an *erroneous* account of a dead man's actions may be forcibly rectified by the intervention of those bearing his name; but what is contested is the interpretation of the word "calumny," and it is declared that there is no "calumny" when a statement touching a dead man's acts is set forth, which statement can be irrefutably proved to be true. Unless this freedom were granted after death, was M. Dufaure's argument, there could be no biography and no history written. No one disputed the *statements* made by Bishop Dupanloup, for most of them reposed on documents written in Bishop Rousseau's own hand; but an attempt was made to show that their production was illegal, and was "calumnious" according to law.

The second day of the trial was a brilliant triumph for M. Dufaure, who carried forensic eloquence upon this occasion to as lofty an eminence as it can perhaps ever reach. The sensation produced both in court and out of doors was immense; and it began now to be felt by the authorities, that a condemnation of the Bishop of Orleans would be too impolitic a course. The password came from the Tuileries, "not to condemn."

On the third day, M. Chaix d'Estance, the public prosecutor, replied to Messrs. Berryer and Dufaure, and evidently laboured under a painful sense of inferiority, as well as under the disadvantage of acknowledging himself the indefensibility of the cause. The Bishop of Orleans used his right, as the accused party, of making the last address to the bench, and did so in a few short

well-worded, straight-forward sentences, and with this the whole hearing of the case was brought to a close. The Sunday intervened, and the Monday was awarded for the summing up of the judge. When this was published, there was, we might say, but one feeling throughout France—unless, indeed, in purely Imperialist circles—a feeling of profound satisfaction. The Bench had, indeed, profited by the permission “not to condemn,” and with the exception of one phrase (in which Bishop Dupanloup’s treatment of his predecessor was described as “haughty and ironical”), the drawing up of the judgment was apparently calculated only to cast a stigma upon the plaintiffs, who were between them condemned to defray the entire cost of the proceedings. At the ministry of justice, and among the government functionaries, there was a murmur of displeasure when the document was printed which absolved M. Dupanloup. It was felt to recoil so severely upon the minister for public instruction, who had been notoriously the promoter of the whole, that many persons went so far as to say he ought to have tendered his resignation—a notion not shared in by himself.

Between the first effort made by M. d’Haussonville to advocate the cause of liberty in France, and the hour at which we are recording that effort in these pages, not quite five months have passed; and on four distinct and important occasions the members of the legal profession have, within that period, made it appear that the French bar had become mindful anew of its former traditions of independence, and would not submit tamely to be the accomplice of tyranny and arbitrary power. This is in many ways a fact not to be overlooked. It would be a remarkable fact in any country, but in scarcely any country an *unnatural* one, because, in most countries of Europe at all events, it is natural that justice, that *law*, should support the rights of citizens, and their political and personal liberties against despotic rule. This, we repeat, is *not* necessarily the case in France, and therefore the recent attitude assumed by the French Bar is one doubly to be noticed, as being in itself highly laudable, and being not natural in modern France. The

revolutionary traditions of France inculcate hatred of the law, and violence is the means habitually resorted to when a portion of the French nation desires to show its governors that it disapproves of either their sovereignty as a principle, or their mode of exercising it in particular. The consequence of this very naturally is, to make right side with might; and thus, the more despotically France is ruled, the more we see the law incline to take part with oppression, and descend at last to be little more than its tool. All this constitutes what logicians term "a vicious circle," in which one turns for ever, but whence one never succeeds in escaping. It would not be quite safe at the present hour to say that "justice" in France is altogether on the side of liberty and of right; for the administration of justice is in the hands of men who have received much, and are aspiring to receive more, from the hands of the government; but this has no application beyond the "*magistracy*" of the country, which is far at this moment from enjoying the pure fame it enjoyed in the days of men like the President Molé, and so many others whose names are synonymous with the words uprightness and dignity. For the last half century (since the epoch of the first empire), the magistrates of France have forfeited their claim to respect, by constantly siding with every oppression that has weighed upon France; and here may be found one of the causes of the small tendency towards *legal resistance* so visible in the French. The depositaries of legal authority *are distrusted*, and a violent action bearing upon them, as upon the government, has been hitherto preferred to any combined action with them.

The present movement is one which originates with or at least is supported by the exponents and students of the law, rather than the administrators of justice; still it is essentially, unmistakeably, a movement of *legal resistance*, and, as such, is of the very highest importance. One of the most remarkable tendencies of the second empire lies towards *legalized tyranny*. Louis Napoleon invariably tries to elude the responsibilities of despotism, and for all his despotic dealings to obtain the countenance and co-operation of the law. This is carried

with this strange-minded sovereign to an extent almost monomaniacal; and one of the aims he most constantly pursues is, the obtaining of the sanction of law for utterly lawless deeds. Just as—when his ambition leads him to “annex” an unwilling people in defiance of every principle of justice—he craves for the wilful act the *countenance* of the other European powers who are thereby offended. So, whenever he has to perpetrate an act of more than usual oppressiveness, derived more than usually from a capricious and arbitrary will, he seeks for it the connivance of justice. The *Bulletin des Lois* is full of enactments, in which the emperor has obtained the consent of the oppressed to what will one day oppress them still more, and in which we may discover the complicity of law with what is absolutely and glaringly unlawful.

This being the case, we think too much importance cannot be attached to the first signs made apparent, of the awakening of legal resistance in France, and it has seemed to us desirable that English readers should not be unacquainted with the details of the combined opposition now organized by the French Bar, against the arbitrary tendencies of the French Government.

ART. V.—*The Law of Torts, or Private Wrongs.* By FRANCIS HILLIARD. Boston (U. S.): Little, Brown, & Co. 1859.

SINCE the days of Ulpian, who wrote as follows—“*Injuria ex eo dicta est, quod non jure fiat: omne enim quod non jure fit, injuria fieri dicitur*” (Dig. 47, 10, 1 pr.), the list of Torts or Private Wrongs has prodigiously and lamentably extended itself. If it be true, as once suggested in our hearing by an eminent judge, now, alas! no more, that “no man could successfully codify the criminal law who had not the d—l at his elbow,” it is at least equally true that no man could catalogue Private Wrongs unless similarly aided. There is indeed “nothing in nature which

may not be made an instrument of mischief," nor can the machinations of fraud or malice be in all cases anticipated by the legislature, or by the astutest draftsman.

Doubtless, as Lord Holt said long ago, "if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompence;" the difficulty, however, lies in adapting the remedy to the wrong, in adjusting the "recompence" to the "injury." "To one," says Lord Coke (3 Rep. 82 a), "who marvelled what should be the reason that acts and statutes are continually made at every parliament without intermission, and without end, a wise man made a good and short answer, both which are well composed in verse:—

'Quæritur ut crescent tot magna volumina legis?
In promptu causa est, crescit in orbe dolus.'

It is, however, requisite not only that our legislators should bestir themselves to provide remedies for Private Wrongs, but that our courts should "amplify" such remedies, and that legal writers, qualified for the task, should digest, examine, and explain them. Strange indeed it is that the duty last specified—of writing fully and satisfactorily on the Law of Torts—has never yet in this country been discharged. And accordingly we opened Mr. Hilliard's volumes with no little interest, trusting there to find—for American law-writers are doing much in liquidation of the debt due from them to our own jurists—an exposition of this important subject, based on intelligible principles, and supported by a copious citation of well-selected cases. This hope, we must at once confess, has not been realized.

Our author thus indicates in his preface the mode of treatment which he has adopted. He first looks "at the wrong itself, its nature, its subject, its author, its recipient or victim, and subordinately its remedy;" and he takes credit for having, at least to his "own partial satisfaction, evolved a *series of principles* far less fragmentary and disconnected" than they had always appeared "when stated in connection with mere forms of action." "In illustration of this remark," he proceeds, "I take the liberty of

referring to the first four chapters, occupying nearly one-sixth part of the whole book, and treating successively of Tort and Contract, Tort and Crime, General Nature and Elements of a Tort, and the applications and limitations of the general principle *in pari delicto*; also, to the 10th chapter, which relates to Possession as affecting the liability for a Tort. From the very nature of these topics it may be inferred, and upon examination it will be found, that they involve *principles* of great comprehensiveness, not modified or coloured by diverse forms of action, and therefore not requiring to be disconnectedly set forth as merely illustrative of such forms. I have myself been surprised to find, for example, how many *general principles* are common to the great trio of remedies, trespass, case, and trover, and also to injuries done respectively to the two grand divisions of property real and personal."

We willingly, then, in accordance with the suggestion of our author, turn primarily to those portions of the work which he has vouched in search of principles "evolved;" but, before doing so, would direct attention to the definition of this much-abused and long-suffering word "*principle*," given in the dictionary of his learned fellow-countryman, Dr. Webster, so far as may be applicable to our present subject. "A principle," says that lexicographer, is "a truth considered as having been before proved; that which supports an assertion or a series of reasoning; a general truth; a law comprehending many subordinate truths." And Mr. Ram, in his admirable Treatise on the Science of Legal Judgment, lays down, that "a principle is a common *ground of decision*" (p. 35); that "where there exists a known principle, it is, under many circumstances, the most fit *ground of decision*" (p. 190), and so forth. The word "principle," therefore, when used in connection with legal science, must not unadvisedly be so used, as synonymous in all respects with "rule," or, worse still, with "proposition."

Commencing our examination of Mr. Hilliard's book at p. 3; we meet with the following passage: "A promise and a tort *may* be coincident, giving to the party injured by breach of the pro-

mise a remedy, as for a simple wrong, without reference to the accompanying contract as such. In other words, the breach of a contract *may* be a wrong, in respect of which the party injured may sue in case, instead of suing upon the contract. Upon this *principle*," &c., and then follows a string of cases abstracted according to the most orthodox recipe for law book-making, designed to establish or illustrate the *principle* aforesaid. But, alack! no *principle* has been stated. It is undeniably true, that in a certain class of cases a remedy may be had indifferently in contract or in tort. But what then? no *principle* is "evolved" out of this statement, or by affirming, as at p. 9, that "an action on the case as for a tort *may* sometimes be maintained, where another remedy would lie for or against a third party, who is connected with the transaction in question;" or as at p. 35, that "the election of remedies *sometimes* applies as well to the party against whom the action is brought, as to the form of action itself;" or as at p. 65, that "the same action *may* constitute at once an injury to a particular individual, and an offence against the commonwealth."

Our author has thus manifestly confounded "*proposition*" with "*principle*," and when, as at p. 36, he talks of the "*principle*" of election, he omits to explain to us, although he might readily have done so, what that principle is; throwing, however, some light upon it in a future page when speaking of the waiver of a tort.

The third chapter of Mr. Hilliard's work is entitled, "General Nature and Elements of a Tort," and ought, as we conceive, to have afforded some considerable insight into the true nature of a right of action *ex delicto*, and the ingredients therein. We grieve to say that we have vainly looked, not merely in this, but in other portions of his book, for any information, definite and satisfactory, touching this important subject. At p. 82, indeed, the author tells us, that "the liability to make reparation for an injury rests upon *an original moral duty*, enjoined upon every person so to conduct himself, or exercise his own rights, as not to injure another;" and "*upon this principle* the action of trespass on

the case lies, in general, where one man sustains an injury by the misconduct or negligence of another, for which the law has provided no other adequate remedy." Of these two sentences, the former would have been better expressed in terms of the well-known maxim, *Sic utere tuo ut alienum non lœdas*; and the latter is so vague and general, not to say positively inaccurate, that it might, we opine, have been dispensed with altogether: the word "injury" being erroneously used for "damage," and there being no appreciable force in the words "for which the law has provided no other adequate remedy," inasmuch as Case and Trespass, Case and Trover, Case and Assumpsit, may often indifferently lie upon given facts at the option of the pleader, and sometimes, as where a bailment is involved, either of the modes of redress or forms of action available may be "adequate."

Again, at the page last cited (p. 82) we read as under—"The distinction, however, is to be observed, that while on the one hand one person cannot, in general, maintain an action against another for doing an illegal or wrongful act, unless he has thereby suffered loss, so, *on the other hand*, no action lies for a loss without an injury—*damnum absque injuriâ*;" and, after citing some few cases, our author afterwards proceeds at p. 84 as follows—"But, *on the other hand*, it has been often held that, in case of wrong or violation of private right, *damage will be presumed*." Here, to say nothing of the awkwardness of the phraseology—and we may observe *en passant* that our author does not cultivate elegance of style—two apparently inconsistent propositions are submitted, without due explanation, to the reader—i. e. (1.) a wrongful act is not actionable unless it causes loss; (2.) in case of wrong damage will be presumed. What our author meant to convey in the ill-penned paragraphs above set out was, we imagine, as under:—"Although a right of action *ex delicto* is often said to be founded on *damnum et injuria*, and cannot originate out of *damnum sine injuriâ*, cases do occur in which the law will—an injury being proved—presume damage;" these cases being when an absolute right, vested in the plaintiff, has been invaded.

The notions entertained by this writer respecting the "General Nature and Elements of a Tort," are, we may venture to affirm, on the evidence furnished by his book, singularly crude and ill-digested. It seems indeed scarce credible that in the chapter specially dedicated to this subject, he nowhere speaks of "duty," "breach of duty," and "damage," as ingredients often to be met with in a Right of Action for a Tort—nor concerns himself with investigating a multiplicity of cases, in each and every of which the particular right of action was judicially said to have been thus compounded, or, in which a logical chain of reasoning proceeded manifestly upon the assumption that it was so. We do not propose to inflict upon our readers, *à propos* of Mr. Hilliard's shortcomings, a disquisition upon Torts; yet we may suggest as noticeable, some few cases involving unmistakeably the idea of duty, breach of duty, and damage, as the compound elements in a right of action *ex delicto*, which the author named has not deemed worthy of citation. In *Brown v. Mallett*, 5 C. B. 599, the judgment of Maule J. proceeds entirely upon this view. In *Barnes v. Ward*, 9 C. B. 392, the question was, whether a duty was cast on the defendant to fence his premises so as to prevent accidents. Similarly in *Coe v. Platt*, 6 Exch. 752, 7 Id. 460, the entire discussion was of this kind, whether a statutory duty was imposed on the defendants such as contended for by the plaintiff.

Our author, it is to be observed, professes to cite English cases, and yet his want of familiarity with them seems to us most singular and inexplicable. A few instances—for we would not fatigue our readers—must suffice in aid of what we say. The great case of *Ashby v. White*, 2 Lord Raym., 948, as to refusing the vote of one having a borough franchise, is of course cited, so is *Pryce v. Belcher*, 3 C.B. 58; whilst *Tozer v. Child*, 6 E. & B. 289, which decided that malice was an essential ingredient in such a right of action, is unnoticed. *Marzetti v. Williams*, 1 B. & Ad. 415, which decided that case lies against a banker, having sufficient funds in his hands belonging to a customer, for refusing to honour his cheque, without proof of special damage, is cited; not so *Rolin v. Steward*, 14 C.B. 595, where it was held that under

such circumstances substantial damages might be awarded. *Acton v. Blundell*, 12 M. & W. 324, is cited; whilst more recent cases bearing on the right to subterraneous water, including *Chasemore v. Richards*, 2 H. & N. 168, and in *Dom. Proc.*, remain unnoticed. Much is said in the work before us of fraud inducing to, connected with, or springing out of contract; yet we cannot find in the table of cases to either volume, or in the text itself, any reference to *Attwood v. Small*, 6 C. & F. 232, which is indubitably a leading case upon the subject named; or to *Wilde v. Gibson*, 1 H. of L. Cas. 605; or to *Cornfoot v. Fowke*, 6 M. & W. 358, or to *Polhill v. Walter*, 3 B. & Ad., 114; or to *Smout v. Ilbery*, 10 M. & W. 1, in which the liability of an agent for fraud was most lucidly, albeit incidentally, investigated by the court. Noticing the above-mentioned omissions, we fear that Mr. Hilliard's treatise can scarcely be recommended to the English lawyer as a trustworthy repertory of cases decided in our own courts, though, as we shall presently admit, it may serve as a useful guide to the American reports.

On turning to Chapter X., which our author specifies in his preface as containing an exposition of *principles* regulating injuries to property, we meet at the very outset with the following ungainly sentence—"Underlying the entire superstructure of property in general, and indeed constituting the original foundation of all property, and therefore, for the most part, an essential incident to the class of wrongs which we are about to consider, is the elementary *fact of possession*; which therefore, in its connection with torts, requires to be very distinctly explained." How, or in what sense the *fact of possession* can be said to *underlie the entire superstructure of property in general*, we confess ourselves wholly at a loss to understand. Peradventure, the author means to express the idea which was long since put forward more perspicuously by Blackstone, who, speaking of real property (2 Comm., p. 8), tells us that "occupancy gave the right to the temporary use of the soil," and "gave also the original right to the permanent property in the *substance* of the earth itself;" and, speaking of moveable or chattel property, says (*Id.*, p. 3), that, "by the

law of nature and reason, he who first began to use it, acquired therein a kind of transient property that lasted so long as he was using it, and no longer," so that "the *right* of possession continued for the same time only that the *act* of possession lasted." Presuming, however, that the author himself understands—and, as he frequently cites Blackstone, the presumption that he does so is but fair—the paragraph with which the tenth chapter of his work commences, we proceed to matter of greater moment. The peculiarity, as our author affirms, of his mode of treating the Law of Torts is this (see pref. v., vii.)—He looks at the *wrong itself*, its nature, &c., and *subordinately at its remedy*; that is to say, he endeavours to disentangle himself from the niceties of Forms of Actions and of Pleadings *ex delicto*, and applies himself directly to the investigation of the various wrongs which one individual can inflict upon another. The plan here indicated can, as we conceive, in one way only be satisfactorily carried out, viz., by, in the first place, inquiring as to the elements in a Right of Action *ex delicto*, the meaning of *injury*, *damage*, *damnum sine injuria* and *injuria sine damno*; and secondly, passing *seriatim* in review, each of the forms of action adopted as remedies for private wrongs; noticing likewise, as occasion may require, the pleadings appropriate thereto. Such is the plan followed by Mr. Broom in his Commentaries on the Common Law (which Mr. Hilliard has cited more than once, though without, as we think, having perused them); and is the only plan or mode of treatment which can be acceptable as well to the practitioner as the jurist. The author whose work is now under review, has failed, however—as we have already partially shewn—in developing the theory of rights of action such as he discusses; and in exhibiting the ingredients which compose them, and his book will therefore merely be useful to the practitioner in so far as it may serve as a digest of reported cases. We may do something towards establishing the correctness of these remarks, by further reference to Chap. X. We there read (vol. ii. p. 2)—“It is the *general rule*—applicable alike to real and personal property—that possession is both sufficient and necessary to maintain an action for a

tort or wrong ; more especially that bare possession gives a right as against a wrongdoer, for the invasion whereof an action of *trespass* will lie." So that in enunciating the very first proposition concerning torts to property, our author finds himself necessitated to restrict it "more especially" to one particular form of action, viz., trespass. But in truth, the "rule" here stated is so vague as to be worthless ; *possession* is both *sufficient and necessary* (*quære* as to the meaning of these words?) to maintain (*quære* sustain?) an action for a tort! We immediately ask ourselves—to what species of tort does this refer? does it, for instance—hold in regard to *Trover*—which is founded on property general or special, coupled with the *right of possession*? Of course, having stated the proposition above set forth, it were easy to fill pages with abstracts of cases bearing upon it with more or less distinctness, and accordingly the ensuing nine pages of the volume are thus devoted. At p. 11, we are told that "*The same principle* is still further illustrated or extended by the *rule*, that actual possession, *whether rightfully or wrongfully obtained*, is a sufficient title against a mere stranger or wrongdoer;" and in the note appended to this paragraph, we read—"The same principle applies to a defence as to an action." It seems, then, that the *proposition* (miscalled a *rule*), stated at p. 2, is at p. 11 elevated into a *principle*, and "illustrated or extended" by *another rule*. This becomes somewhat puzzling ; but, stripping off useless verbiage, we suppose that the author means at p. 11 simply to affirm, that "actual possession, whether rightfully or wrongfully acquired, is a sufficient title against a mere stranger or wrongdoer;" and also as against him might afford a valid ground of defence.

Without further indulging in minute criticism, which might be wearisome to our readers, but to which this portion of Mr. Hilliard's work offers almost irresistible temptation, we will content ourselves with again complaining of the extreme *vagueness* of the propositions stated in it, and of the wideness of range thus offered for the citation of cases, which have been collected with considerable industry, but might far more usefully have been presented to practitioners under the well-known technical heads,

with which those who consult legal digests are familiar, than in a treatise like the present. We complain also once more of the fearful abuse of the word "*principle*," of which this writer, we grieve to say it, is systematically guilty. "While possession is sufficient, it is also *in general* necessary to maintain an action for tort," (p. 14.) "The want or absence of possession *may sometimes* be set up as a defence, possession being the foundation of the alleged liability upon which the action (*query*, what action? trespass?) is founded" (p. 25), to which the following passage at page 28 has reference:—"Upon the same principle is founded the well-established rule, that if the defendant in an action of Trover has no possession, actual or constructive, at the time of demand and refusal, and there has previously been no tortious taking or withholding, he is not liable, though he may have forcibly interposed obstacles to the owner's obtaining possession." "The well-established *principle* (*query*, doctrine), that possession may be constructive as well as actual" (p. 37); "one prominent characteristic of a nuisance, technically so called, is, that it is to some extent an *undefined* injury!" (p. 66.)

But, although the author of the volumes before us has failed in tracing out the operation of—nay, even in accurately stating—*principles*, he has yet collected together many *cases* on the law of torts, which, being for the most part arranged under proper heads—Assault and Battery—False Imprisonment—Libel and Slander—Malicious Prosecution—Nuisance—Trespass—and so forth—will, we doubt not, be useful to the American, and not without value for the English lawyer. Happily, the practice is daily becoming more frequent in our courts, and more favoured by the Bench, of citing American decisions, of discussing freely the reasoning upon which they were founded, and the strictures made upon them by learned writers. We sincerely rejoice that this is so; for the law administered in the Transatlantic courts is in substance identical with our own, administered as efficiently, and far more widely known and studied among the peoples who are subject to it. The great writers, too, who have flourished in the sister-country since she became a nation, are not one whit inferior

to our own modern writers in reputation or in learning. To Littleton, to Coke, to Blackstone, to Hargrave, or to Williams, she may in common with ourselves look back with deference and affectionate regard; whilst of Wheaton, of Story, of Kent, of Duer, and of Greenleaf, she may justly and exclusively be proud. Impressed with such feelings, and having for years past applied ourselves, when opportunity offered, to the perusal of reports and treatises current in the United States, we are ever disposed to welcome with cordiality accessions to the store of legal literature vouchsafed to us from that quarter. We unfeignedly regret, therefore, that in this instance we cannot accept the proffered boon with feelings of pleasure unalloyed.

ART. VI.—*Papers read before the Juridical Society, 1855–1858.*
London: Stevens and Norton, 1858: and Vol. II. Part I, 1858; and Part 2, 1859: Maxwell.

SINCE our former notice the Juridical Society has pursued its even course, and given to the profession many valuable papers and many interesting discussions. It now holds a position quite as important and assured as could have been expected from the difficulties with which it has to contend, and which it will be well to begin with pointing out, both to give the Society just credit for what it has accomplished, and to stimulate it to renewed efforts to accomplish more. We shall express ourselves freely, being convinced that the welfare of this Society is important for the science of law in England.

The first of these difficulties is the small leisure which it is possible for the leaders of the Bench and Bar to devote to such an institution, even where the inclination so to devote it is present. What success could the Geological Society hope for without the Sedgwicks and Murchisons of the day? Or the British Association without the Whewells, Brewsters, and Owens? Now

between a scientific union for the study of jurisprudence, and for that of any other branch of learning, there is this necessary difference of circumstances. The discoveries with which the Sedgwicks and Murchisons delight the Geological Society in winter, are the results of their own surveys in the summer. The novel truths in philosophy, which an Owen can reveal to his audience in the evening, are the fruits of his regular labour of the morning. The society, in a word, and the associations of its members, are not separate—the one adds no toil to the other; they are both parts of the same scientific life. The public communication is the natural sequel of the discovery in the field or the closet. But with a society of lawyers, banded together for the advancement of jurisprudence, the case is otherwise. The day's practice is not such as, from its nature, may be expected to furnish the material for the evening's scientific paper. It may do so in certain cases; but, as a rule, the harder it is, the less time, the less energy, does it leave for a purpose which demands reflection not immediately arising out of its own routine. We had almost said, the less inclination; nor will we shrink from saying that, since there is a sense in which it may be said without reproach. The man of cultivated mind must extend his circle of interest beyond law—beyond the science as well as beyond the practice of law; and little enough is the leisure which a successful professional career allows to some of the Englishmen best fitted for public life, to attain a real comprehension even of the great questions of the day, or to some of the first intellects of the country, not to fall too far behind the general intellectual march of the age. It is not then to be expected that the Juridical Society can ever number among its more active members, particularly as authors of papers, very many of those who hold a position in the law corresponding to that of the great names we have mentioned in other sciences. Nor can this fail to be felt both as a loss and as a discouragement. Yet a good example has been set by several; to mention names would be invidious, but some appear with credit to the Society and themselves in the published Transactions; and we

cannot but think that more might be done. Those only who have frequently attended the meetings know how important are the discussions, considered as one of the means by which the Society promotes the study of jurisprudence. Perhaps in no learned society is their relative value, as compared with that of the papers, higher than in the Juridical. On the one hand, there is the personal weight of those who occasionally take part in the discussions without having the leisure to write ; on the other, the speculative character of the science itself, in which the paper almost necessarily proceeds from the point of view of the writer, whose positions are therefore liable to correction and extension from the contact of other minds, and is not, as in the physical sciences, the announcement of some positive discovery, which may excite admiration on the instant, but from which further consequences can hardly be drawn until further observations have been made. In this state of circumstances it would surely be no less a pleasure to themselves than a benefit to others, if all those leading members of the profession who regard their art as no empirical trade, but as the application of one of the noblest sciences of humanity, would from time to time avail themselves of that opportunity which the discussions of the Juridical Society afford them, to communicate and enlarge the fruits of their experience and reflection. We believe that a more frequent attendance at the discussions would even elicit papers from many who would now think such a result for themselves impossible. We are sure that even without such a result it would do great good.

The next difficulty which we would point out as encountered by the Juridical Society, is the want of any public outside the profession which may take an interest in its proceedings. That large section of the educated classes which is imbued with physical science, and has a taste for it, though failing either in the capacity, the leisure, or the inclination for pursuing it to any extent, is brought by the scientific associations into a contact with the learned which is of the greatest value to both. The latter gain by the communication of many facts, which the observers of

them would never make public in independent treatises, and the whole importance of which would never occur to any mind not conversant with the science to which they relate; and they gain scarcely less by the energy and encouragement which the student derives from knowing that his labours are appreciated, and their results looked for with interest, by a wide and intelligent circle. The former gain by the opportunity afforded them in such associations of becoming in some measure acquainted, and that too in an easy and entertaining manner, with the progress both of theory and discovery. It is certain, also, that in the matter of writing, no discipline is better for the philosopher than that he shall be called on to explain his ideas to those for whom clear statement and copious illustration are necessary, but who are quite capable of comprehending him when clear statement and copious illustration are given. It has been said, with a half sneer, that French men of science always write as though there were to be ladies in the gallery; but assuredly the French scientific style is one that may well be copied in force and perspicuity. Now it is one of the great obstacles, not only to the success of a society devoted to the cultivation of jurisprudence in England, but even to such cultivation itself, in whatever manner pursued, that there is not here outside the legal profession any public which can appreciate the subject. In order that the laws of any country should be suited to the state of its society and the genius of its institutions, the first condition which must be satisfied is that they shall emanate from no clique, class, or profession; but that every part of the national intelligence shall contribute according to its power in shaping them. This we secure in theory by our parliamentary system; while in reality the measures relating to private rights and remedies which pass through parliament are almost exclusively introduced, discussed, amended, and adopted by the lawyers in the Houses, without any important intervention either by the other members or by the constituencies; or where any other class is prompted to intervene by the unusual importance to them of the particular subject in question, as has happened in the instance of the law of bankruptcy with the mercantile class, the successive failures of our legislation on

bankruptcy are an instructive comment on the mutual misunderstandings which arise, and the general unfitness which exists for bringing any such legislation to a successful issue by the combined action of those whom it concerns. Probably in every Utopia it has been provided that at least an elementary course in the laws of the country should be an essential part of all liberal education. It is not the least among the evils of a jurisprudence beset with technicalities, and absolutely devoid of sound method, that, where it exists, that dream of all political philosophers must always remain Utopian, though elsewhere it may be realized. This was not once the case with English law. There was a time when gentlemen passed through the inns of chancery and court, as regularly as now through the schools and universities, and then it was that our common law was established on a broad national basis—an advantage not possessed by the laws of other European countries, which, as their basis was taken from that of ancient Rome, stood in relation with little but the scholastic part of the national life. How English law lost that vantage-ground would form a very interesting subject for inquiry. It may have been marked from the first by a spirit of technicality, akin to that punctilious adherence to form through which our liberties have been preserved from the encroachments of monarchy on the one hand, without the assertion of revolutionary principles on the other; but, if so, this is a spirit almost as essential to be restrained in law as to be fostered in politics. Or the common law may, by that very closeness of relation to the peculiarities of contemporary society which constituted its original merit, have carried about with it from the beginning the danger that, unless renewed from springs lying deeper in humanity, it would become antiquated together with those peculiarities. There would, of course, be less of such danger for that law which, having been already generalised by the jurists of a world-wide, though ancient, empire, could never thenceforward be either so applicable, or so inapplicable, to any one condition in which the human race can exist.

There is a story told of Sir Thomas More, that, when challenged by a continental *savant* to a discussion *de omni scibile*, he routed

the challenger by a crabbed question on the law of replevin. The triumph may have been legitimate at the time; but the bitter aftertaste of it is, that the commonest question of English law might now as easily rout the most learned Englishman, even supposing, in order to put the isolation of our law in its most striking, but not in an exaggerated light, that the question related to contract, and that the man to whom it was put was especially conversant with ethical philosophy, and in the habit of commenting on the ideas of contract and obligation every week of his life. If in any degree this reproach has been brought on our law by its too rigid refusal to draw from foreign sources, it is an illustration of the universal truth, that those who will excommunicate others shall end by being themselves excommunicated. But, whatever the cause, the fact is, that any sort of discussion on law is less intelligible and interesting to the educated public of this country than to that of perhaps any other. Now it appears to us that, although it has as yet, in comparison with other learned societies, only suffered from the want of what we may call an outside public, the Juridical Society may accomplish much towards creating such a public for itself, and thereby bridging over the chasm which separates the law from the general intelligence of the country. We have already seen lawyers, manufacturers, merchants, statesmen, and gentlemen who were none of these, meet together for the discussion of legal topics, and with the best effect, in the Association for the Promotion of Social Science, at Liverpool and Bradford. Why should not what has proved possible in the country be equally possible in London? Why cannot lawyers, merchants, statesmen, physicians, clergymen, and gentlemen, meet in a quiet room near their own doors, for purposes for which they have proved themselves ready to travel some hundreds of miles? It is true that the Juridical Society cannot offer them a page of the *Times* at the dead season; but if it can offer them an opportunity of talking with one another face to face, and understanding each other, we apprehend that that is better, and will draw all needful publicity with it. Its rules admit of members who do not belong

to the legal profession, and two such, the Rev. F. D. Maurice and Dr. Forbes Winslow, have enriched its Transactions with valuable papers. We wish to see more of this co-operation; and we submit that a society which only discusses, without expressing any opinion or taking any resolution as a body, affords a peculiarly fit arena for it. A premature attempt to pass from reflection to action not only takes from crude notions their legitimate chance of correction and development, but introduces earlier than necessary the motives of display, popularity, and rivalry, never to be wholly avoided when the stage of action is reached, but capable of nipping all good results in the bud if allowed to intrude too soon; and in a body where, since after all no actual alteration in the law can result from it, the conduct of the members cannot be controlled by any very serious feeling of responsibility. It may therefore be justly thought that, even considering the Juridical Society as one of lawyers, and of lawyers always bearing the amelioration of English law in mind while discussing the most abstract questions of theory, it does wisely to abstain from passing a corporate judgment, and leave any truths which may be brought forward at its meetings to ripen in the minds of its members until they can be advocated to a practical end in Parliament. On this however we do not commit ourselves to a positive opinion, knowing that the Law Amendment Society, which takes a different course, has been very beneficial. But we are sure that, for those who are not lawyers, a society must be better in which they will not be called on for an immediate decision on subjects of which so much must be new to them.

Another great difficulty of the Juridical Society, though self-imposed, consists, we submit, in the somewhat restricted interpretation which, to judge from the published papers, usage seems to have put upon its objects. The topics treated of are all such as might most worthily find a place in any similar body of transactions; but taking the selection as a whole, and particularly in connection with the mode of treatment of the topics selected, it seems to us that there is too great a desire to avoid details of law. Now the Society can never perform any important service

towards the study of law, or even of jurisprudence, in this country, unless that feeling, supposing it to exist, be entirely got rid of, and a far wider range of subjects, and one including more detailed and specific applications of broad principles, be considered as within its limits. To decline such applications might almost indicate a want of faith in the principles; nor does there seem any reason, on the lowest grounds of expediency, why the Society should shrink from measuring its strength against the difficulties which always beset the passage from theory to practice, and particularly that from jurisprudence to law. It may perhaps be feared that the Society would not sustain its interest if the subjects discussed included more of dry detail. We do not know that this reason has been put forward by the body itself; but many members have probably been influenced in their choice of subjects to write on, by a natural reluctance to trespass on an audience assembled for relaxation as well as for instruction. But is it so sure that the Society can maintain its interest without going more into detail? Is not the circle of broad subjects necessarily limited? and must not the Society, after several years of existence, if it reject the path we indicate to it, be reduced to the alternative of treading that circle till it becomes a wearisome cycle, or of perishing from inanition? Another restraining motive may be the fear lest the discussions should degenerate into the arguments of a debating society, addressed to the dry question of fact, what on any particular point the existing law is. Yet in an assembly met for the most truly juristic purposes, it must often be important to discuss what the law is. How, for instance, can the occasional necessity of such a discussion be avoided, if the business of the evening be to review our jurisprudence with reference to any great legal idea, as that of legal fraud; or, since the business of many evenings would lie there, some application of that idea, as in the controversy between the maxims *caveat emptor* and *caveat venditor*; to ascertain how far in such respect our jurisprudence was consistent with itself, how far it varied from the systems of other nations and ages, what foundation in the diversity of social habits there might be for

the difference, which was the morally rightful system where the difference could not be explained? Or, again, how avoid the occasional necessity for discussing the actual laws of conspiracy and false pretences, if the business of the evening be to consider some proposition for a more stringent law against false and deceptive marks of quantity or quality on goods? But whether such occasional necessity has any thing in it which might threaten to lower the character of the Society's debates, is a point that depends on the good sense of the members, in which we have full confidence. Nay, further; in proportion as the papers and discussions were more obviously directed to infusing the best spirit of jurisprudence into our actual law, the proceedings would become more attractive for the leading members of the bench and bar, whose presence would tend to counteract any danger of the kind apprehended.

In our previous notice of the papers published by the Juridical Society, we brought down our review to Mr. Leake's essay on "The Statute of Frauds, as it affects the Law of Contracts." The next paper to that is by Mr. Daniel, Q.C., on "Advocacy as connected with the Administration of Justice." After rejecting the extreme opinions on either side, Mr. Daniel enunciates the principle that the wants and necessities of the suitor render the system of advocacy essential to the due administration of justice, and that its true limits must be therefore defined by those wants and necessities, which he further understands as including all that to which the client may legally pretend, whatever opinion the advocate may entertain on the moral propriety of his enforcing his legal pretensions in the particular case, as where the statute of limitations is pleaded to an acknowledged debt. But how far, where either the law or the fact is disputed, must or may the counsel prejudice it? On this vital question, Mr. Daniel "takes as unquestionable" the distinction of Cicero; *judicis est in causis semper verum sequi, patroni nonnunquam verisimile, etiam sit minus quam verum, defendere*. "The judge must examine the evidence as to facts in every point of view which he may consider necessary to the establishment of the truth. The judge must

consider and determine the law as applicable to the facts, as he considers them to be established. He must contemplate the picture from the several points of view in which it is presented to him on behalf of the opposing parties, and in such others also as in his judgment ought to be regarded. The advocate, on the other hand, is concerned in dealing with the facts and the law as they bear upon the interest he represents, and in this view is justified in concerning himself only with the *probable*. The effect of thus subjecting the case to the free action of opposing influences may reasonably be expected to be that the straight line of truth and justice will be attained and secured in the judgment."—(P. 306.)

This is all very well, only, since the probable cannot be defined, like the true, by a mathematical line, the difficulty of deciding how far he may go with a good conscience is thus thrown back on the advocate, under the form of deciding how much is probable. Nay, men's natural tempers differ so much in the estimate of what is probable, that, if it were usual for counsel to follow this rule, which it is quite needless to say that it is not, there would be prodigious discrepancies in the lengths to which different counsel would venture. One man sees no doubts; his opinions are clear and positive, though perhaps not the less frequently wrong for that, or the less destined to be changed by himself after a time; nothing is to him *verisimile* which is not also *verum* to him for the moment. While he holds his opinions, he laughs in his sleeve at the notion that the arguments he is retained to use on the other side are probable, though he is well aware that they may perhaps succeed, not merely, and perhaps not chiefly, from his own skill in putting them, but also because a man of such hasty and positive temperament is generally taught by experience that other minds often see things differently from him, and, as he cannot follow their windings, he can never exactly say when such difference of mental vision may not crop out. Another man feels himself the strength of the opposing arguments, though with more or less of decision he has made up his mind to reject them; and, if the disputed point be one of law, and the counsel a thoroughly good lawyer, his

reflection on the case will probably end in his seeing just as little probability as the first person we imagined in the arguments which he is retained to urge, though his conviction of their improbability will rest on better grounds, as he will himself have passed through the mental condition with respect to them into which he must now try to throw the judge. Can any system of advocacy be reasonably defended on grounds which, of the three very common characters whom we have pictured as secretly opining against their causes, would equally forbid the defence of those causes to the one whom every one would pronounce most fitted for an advocate, and to the one whom every one would pronounce most fitted for a judge, and permit it only to the one who was unable to form even an ultimate opinion without hankering after a phantom of probability on the other side? For our parts, we are not more fully persuaded that the system of advocacy, as actually practised, involves the deliberate attempt to make the worse appear the better reason, than we are that, if that deliberate attempt be excluded, there is left no possible system of advocacy by counsel having a competent knowledge of the law, and not armed with the freedom as to refusing briefs which, from the evidence adduced by Mr. Daniel, appears to be exercised in France and the United States.

We do not, however, intend these remarks as necessarily condemnatory of the system in which, without being suffered to misstate a fact, a statute, or a reported case, the lawyer is yet suffered to labour that conclusions may be drawn from them by others which, as a jurymen or a judge, he would not draw himself; or to prevent others from drawing conclusions from them which, as a jurymen or a judge, he would draw. There remains on behalf of that system the common argument, that it is the best adapted for eliciting the truth, by ensuring that all shall be said on each side which can be said. Into the validity of that argument this is not the occasion to enter, as it would require a lengthy discussion, both as to the adaptation of the system for eliciting the truth, and as to the moral sufficiency of the defence if the assertion involved in it be granted. Mr. Daniel cites the argument

as put by Mr. Montagu in his tract on "the Barrister," and rejects it. We do not think that he has, in his turn, succeeded in establishing a distinction on the verisimilitude of the conclusions which an advocate may draw from the facts and authorities; but in this we probably refuse him no meed which he would claim for himself, since even of the English practice, which he appears to suppose generally agrees with his principles, he asks in the end of the essay, "may it not be that we make too great a sacrifice of principle to expediency?"

We cannot however leave the subject without pointing out an aspect of it, which is indeed so obvious that we should much wonder at its having been so generally disregarded, were not such neglect sufficiently explained by the reluctance of human nature to look at home while censuring others. That lawyers should do that, in reliance on its working to a good end in conjunction with other parts of a system, which, if it were isolated, they would be deterred from doing by the apparent mischief in that case to follow—if even on the mere contemplation of such actions as isolated there did not burst forth an indignation forestalling the calculation of the mischief to follow—that this, we say, should be done by lawyers, is no peculiarity of that profession. In what respect does it differ from the conduct of a soldier who sheds blood in a quarrel which he disapproves, because it is, or is thought to be, best on the whole that an armed body should follow its standards, throwing the responsibility of peace and war on those whom it serves? Is there one argument which can deter a lawyer from identifying himself with his client, which ought not equally to deter a soldier from identifying himself with his nation or his government? Is there one reason against the resignation of the right, or for the inapplicability of the duty, of private judgment, which can be so urged in the one case as not to meet the other also? We will take an example from a higher sphere. How many clergymen are there who believe every clause of the so-called Athanasian creed, in which yet they profess their belief on the most solemn occasions, because it seems to them better that a Christian ministry should be maintained, or for some other reason which equally subordinates the particular

action to the general result? Candidly to avow such subordination is at least a better method than to put a private interpretation on words which are rejected in their natural sense, though it is in fact only by looking to the general result that honest men are betrayed into non-natural interpretations. We do not judge any of these cases. It may be that they all belong to a rude and early phase of society, in which obedience may be rendered to professional system, to temporal rule, to ecclesiastical authority, with an unfeigned simplicity of heart, which it is constantly growing more difficult to realise after the sense of individual responsibility has been once thoroughly awakened in a nation. If so, the doubts intimated by Mr. Daniel may be destined to increase in strength with the progress of society, and the discredit which has been thrown on the law for the completeness with which the sense of individual responsibility has been merged in the adherence to a system, may be changed into credit for its being the first to adapt its practice to the ethical requirements of a different age.

There next follows that eloquent essay by Mr. Maurice, to which we have already alluded, on "the moral distinction between law and equity." Aristotle declared τὸ ἐπιεικές to be the modifications which, to prevent injustice in particular cases, it is necessary to introduce in the application of those universal rules by which alone τὸ δίκαιον can be expressed. This distinction between the equitable and the lawful Mr. Maurice justly treats as quite insufficient. Such an equity would be merely a weak law. We may add, that least of all could the definition apply to English equity, in which the judges always aim at proceeding by rules as universal, and as capable of definite expression, as those of the common law. The notion and term of "fraud," for instance, may occur more frequently in equity than at law, but it does occur in both; and, being a primary notion, is not definable in either system in the sense of its being possible to substitute any other word or combination of words for it, or to enumerate in advance all the circumstances which may indicate its presence; while the rules which provide for the case of fraud can be expressed in advance in both systems, different though they are in

the two. Mr. Maurice then passes to Cicero, in whose language, as well as in that of the imperial jurists, he sees the conviction of an eternal equity underlying law, and of which human law can never be more than the imperfect image. Doubtless it was through this conviction, which they possessed in so eminent a degree among the nations of antiquity, that the Romans became the rulers of the earth; and the merit of their law was derived from the unceasing pains with which they sought to realise in it the image thus impressed upon their consciences. In the middle ages the same idea was farther strengthened by Christianity; and, while the king became the fountain of justice, he was bound to exercise that office according to conscience, from which the duties of the chancellor, as the king's conscience-keeper, arose. Thus, English equity was not, in its origin, antagonistic to law; "for certainly a belief which is the opposite to this, a very deep and settled belief, that law and equity have both their foundation in principles of morality and reason, and that each sustains the other—positive decrees implying a justice or equity which they can but imperfectly express—equity continually referring back to fixed letters and forms as a witness against the caprice of judges and rulers, and as a protection from it—has been the strength of the English character—has given a stability to our nation which nothing else could give. This belief has found various ways of expressing itself; some of them have become quite unmeaning and obsolete; but that which they contained does not, I hope, perish when they perish. It may become stronger by being freed from the restraint which they imposed upon it. As the thought of a keeper of a sovereign's conscience is lost, the idea of a national conscience, which the sovereign embodies, of which every inferior functionary who acts for him is the guardian, which every man does something to make clearer or darker, more pure or more corrupt, may be fully working itself out."

These remarks are very suggestive. So much is equity the inner spirit and idea of law itself, that, when they are administered by different courts, the real puzzle is not to know what equity is, but to know what law has become without it. Certainly, under

such a separation, law no longer answers to the *ars boni et æqui*, or to any other idea which has ever been attached to *νόμος*, or *jus*, or *droit*, or any other apparently cognate term in any language. It has shrunk to a mere body of rules. When, in the fourteenth century, the clerks of the chancery refused to issue new writs to meet new cases, notwithstanding the plain direction of a statute that they should issue them, one understands in a moment the necessity there was that the keeper of the king's conscience should interfere to supply the defect of justice, but it would be a metaphysical curiosity if any one would inform us what were the conceptions of the clerks about law. The subject however is too grave for light treatment, as the circumstance we refer to was but one among many overt acts indicating a determinate bent of the national mind at that epoch, by which it not only repudiated the conviction that a judge, as such, is, subject to the positive law of his country, the interpreter of "that sense of right and justice which is latent in all men," whatever, in fact, a king's conscience-keeper can claim to be—a conviction which elsewhere has been handed down uninterruptedly from Roman times—but also could for centuries be with difficulty brought to endure that a king's conscience-keeper should step in to fill the void created. No doubt it was in great part a mistaken effort at fixity and certainty in the law: an error on the right side. And if we consider the struggle as it particularly affected bonds and mortgages, we shall see in it the exaggeration of another good political quality, namely the respect for personal independence, producing a belief in the absolute right of every man to make binding laws for himself by way of contract, however absurd or unrighteous. But, whatever was its source, Shylock-law has long been defunct among us as law, and threatens daily to become defunct among us in its last organised form, as a distinction of courts. In an inorganic form it will linger yet, in that narrow method of interpreting statutes and other authorities which may be described, with as much truth as is to be expected from an antithesis, by saying that it regards a written letter not as presupposing, but as excluding, the functions of a living interpreter. In calling it a

narrow method, we do not wish to prejudge so vast a question by a sentence, while noticing a volume of miscellaneous essays. It is narrow, but, with all seriousness, there are broad paths which lead to destruction. A mean may be best. The strict interpretation of authorities is a constitutional safeguard; but, in the matter of private rights, it will defy every attempt to reduce in any important degree the length of the statute-book and reports which form our *corpus juris*, or permit it to be reduced in one generation only to restore its volume in the next, after working no small amount of injustice in the meanwhile. Those who press for a code should carefully weigh what the result of a code would be, with our received methods of interpretation.

The next paper is one of three on the history of Roman law, numbered XVII., XXIII., and XXIV., in the volume, by Dr. Colquhoun, then the secretary of the Society, and now one of the judges of the Ionian Islands. They form an erudite series, in which the subject is pursued from the primordial tribes of Italy to the lower empire and the western barbarians; and it will easily be understood that when so vast a field has already been included in such narrow limits, compression must have reached that point at which the reviewer can carry it no farther. Our readers will learn much from the original papers, which we recommend to their perusal.

At this point we must break off. There are so many other papers which deserve a particular notice, that the space at our disposal compels us to postpone our remarks on them, and on the questions which they raise, to a future opportunity.

ART. VII.—CONVEYANCING IN SOUTH AUSTRALIA. MYSTERY IN ENGLISH LEGISLATION.

THE South Australian Real Property Act, to which we called attention in a recent Number of this Magazine,¹ has proved to be a most successful measure. It has met, we understand with the determined opposition of the conveyancers of the Province, with whose emoluments it has materially interfered; but, nevertheless, the business of the Registration office has gone on steadily increasing, as is shown by the following returns lately issued by the Registrar-general:—

RETURN showing the BUSINESS transacted in the LANDS TITLES REGISTRATION OFFICE of SOUTH AUSTRALIA in the last half-year of 1858, contrasted with the transactions of the last half-year of 1859:—

	Six months ended Dec. 1858.		Six months ended Dec. 1859.
Applications for change of Title	184	.....	553
Transfers	53	.....	110
Mortgages	24	.....	160
Releases	0	.....	7
Leases	1	.....	36
Settlements in Trustees	0	.....	2
Caveats	0	.....	4
Fresh Grants registered	351	.....	326
	613		1,198

AMOUNTS of FEES received during the above periods:—

	1858.				1859.		
	£	s.	d.		£	s.	d.
Payable to Commissioners ...	157	0	0	...	273	5	0
Assurances	43	0	8	...	721	13	3
Registration	132	4	0	...	1,063	4	8

Total £332 4 8 ... £2,058 2 11

	£	s.	d.
Value of land under operation of Real Property Act on 31st } December, 1859	718,233	0	0
Amount secured thereon by mortgage.....	59,019	0	0

¹ L. M. and R., Vol. VIII., p. 162. A paper on the operation of this Act was read at a late meeting of the Law Amendment Society, by a gentleman who actually *had not seen* the Act, although copies of it (published by Messrs. Butterworths) were to be had six months ago! The paper, and the discussion held on it at a subsequent meeting of the Society, were worse than worthless. Time was wasted, and those who were interested in the subject and knew the state of the case, were disgusted at the extraordinary presumption displayed in any one bringing forward a subject of which he was culpably ignorant.

RETURN showing the NUMBER of TRANSACTIONS in LAND in SOUTH AUSTRALIA under the REAL PROPERTY ACT, during the last half-year of 1859, contrasted with the number of such transactions under previous Laws during the same period.

Transactions under Real Property Act	1,198
Transactions under former Acts, as shown by memorials of instruments registered in the General Registry Office }	2,073

Total Transactions..... 3,271

R. R. TORRENS, Registrar-General.

In examining these returns, it is necessary to bear in mind that the Act renders registration compulsory as to all lands in respect of which fresh grants have been made since it came into operation. The number of these compulsory registrations is given in the returns, and to their number must be added the number of dealings with lands so compulsorily registered ; but, making all due allowance for these cases, it is, we think, a most astonishing fact, that during the latter half of the year 1859, although the Act had not been eighteen months in operation, the number of transactions under it amounted to 1198, while the number of transactions under previous laws amounted to but 2073, so that actually *one-third* of the conveyancing business in land in the Province was carried on by means of the new registry !

There can be no doubt that the success of a measure of this character and scope, is wholly dependent upon the efficacy and aptness of the machinery set up for carrying approved principles into actual practice. The consequences of the breaking down of the machinery, or of any obstruction or confusion arising from its inefficiency, would be disastrous in the extreme ; and therefore the work is but half done when left (as, for instance, by Sir Hugh Cairns in his Registry bill) to be supplemented by further legislation, or by regulations to be framed by the registrar.

Mr. Torrens brought the whole of his great practical experience in conducting the transfer of shipping property, and in the registration of title-deeds, to bear in the preparation of the South Australian Act. "Wherever it lays down a principle, it likewise prescribes the manner in which it may be carried out,"¹

¹ Mr. Torrens has lately addressed three letters to the editor of the "South Australian Register," in which the Act is contrasted with Sir Hugh Cairns' bill. The above passage occurs in one of these letters.

and we are enabled to state, upon the highest authority, that the machinery of the Act has hitherto been found adequate to meet every contingency. It is to this that the complete success of the measure must be attributed.

In this country, the preparation of similar measures is left to persons who are utterly unacquainted with the practical working of registration,¹ which sufficiently accounts for the contempt with which such measures are viewed by those who have the slightest knowledge of the subject proposed to be dealt with. We are well aware that the difficulty of applying a general registry to land in England or Ireland, where titles are complicated and dealings intricate, is incomparably greater than that which was experienced by Mr. Torrens in the application of the principles of registration to land in Australia, where titles and dealings with land are far simpler; but, if our government were really earnest in this matter, and would commit the task to a man possessed of a *practical* knowledge of registration, we might possibly have a system introduced here which would be capable of being worked, and of which a very numerous class of landowners would gladly avail themselves. We regret to find that Sir Richard Bethell, from whom we expected better things, follows in the footsteps of his predecessors, and childishly keeps the profession in the dark as to the nature of his long-promised reform of the law of transfer of real property. Sir Richard knows perfectly well that a radical change in the laws of real property cannot be efficiently considered in a committee of the House of Commons, and he also knows that he would not be divulging a state secret were he to cause his measure to be printed and distributed before its introduction into parliament.

Sir Richard, moreover, has reached a point of eminence which must render it immaterial to him whether the effect of a speech of his in the House would be spoilt by the principle of his measures being known beforehand; and we therefore can attri-

¹ Mr. Torrens observes, in the letter we have alluded to in the foregoing note, that the perusal of Sir Hugh Cairns' Registry bill "forces the conviction that he could have had no *practical acquaintance* with the business of registration."

bute his silence to nothing but the bad *habit* of secresy in bill preparation in order to secure the advantage of a surprise in parliament, or to a feeling of fear lest his bill, when subjected to the minute criticism of conveyancers, might prove worthless, and preclude him altogether from even introducing it. His reticence portends no great good to the cause of law reform.

We reiterate—and shall continue to reiterate till we see reformation—that it is not the reputation of a particular ministry, or of a law-officer, which is chiefly concerned in the carrying of a great measure. Party objects are connected in a very trifling degree with the accidental circumstances of an important bill being carried by Sir Richard Bethell or Sir Hugh Cairns. It is a triumph of a very unreal kind to the law-officers of the crown, when a measure of the description we are speaking of succeeds in their hands. They neither initiate it, nor devise its general or particular scheme. It is forced upon them; and the bill itself is drawn by a more or less competent draughtsman upon instructions derived from a variety of sources. Why, then, should not a bill on so important a subject as this be drawn by the best hands, and be printed and laid before the profession for consideration and revision, and when revised be introduced to the House by the law-officer for the time being? Why affect mystery in these matters, and endeavour to spring mines on the public? The measure which is fit for Sir Richard to introduce and explain to the legislature, would be suitable for Sir Hugh to accept the care of. There can be no rivalry in such a matter—no one supposes either of the gentlemen to be the author of the bills he fathers. But each should make himself responsible for them on this substantial ground—viz., the probability of their merit, and the approval of those competent to judge. The public requires well-digested measures, not parliamentary fireworks.

ART. VIII.—*Report of the Commissioners appointed to inquire into the Existence of Corrupt Practices in Gloucester.* 1860.

THE long vacation of 1859 beheld, as usual, every lawyer who could escape from chambers and office seeking repose after the manner of Englishmen, by undertaking every species of toil and difficulty—rushing through foreign countries—climbing up inaccessible mountains and down horrible glaciers—and undergoing the excessive fatigue of sight-seeing in general through all the quarters of the globe. But no such good fortune, however, befell those self-denying counsel who, having been appointed to act as commissioners to inquire into the existence of corrupt practices in the city of Gloucester, found themselves condemned to the poisonous company of a crowd of disreputable persons, and engaged in the nauseous duty of investigating the detail of villainy and blackguardism, in which rich and poor of that city had indiscriminately been wallowing.

James Vaughan, Lucius Henry Fitzgerald, and R. G. Welford, Esquires, were the “trusty and well-beloved” barristers-at-law who were appointed on the commission in question; and they performed their laborious and obnoxious duty so well, that the blue book they have issued is of more than usual value. The 618 pages of evidence exhibit the skill and industry of the commissioners; and the Report affixed to the evidence is a well-drawn and able production—especially valuable, as containing much which bears *generally* upon the law relating to elections. We, therefore, propose here to offer some comment on the Report before us, and on the transactions on which it is founded.

Before the Reform Bill was passed there were, it appears, about 2000 electors in Gloucester, 1200 of whom were thereby disfranchised. At the last election there were, unfortunately, as many as 534 “freemen” out of the gross number of 1721 electors. After making necessary deductions, this number became reduced to 1500. The evidence taken before the commission

clearly establishes, beyond all controversy, what indeed was always pretty generally believed—that Gloucester contains a grossly corrupt body of electors; and that, in the elections of 1857 and 1859, corrupt practices prevailed to an intolerable extent. The family and personal influences which have long surrounded this place, seem always to have been inimical to purity of principle; and the moral tone of the district has invariably been, as it still remains, entirely debased. “Immemorial as the origin of electoral corruption appears to be in Gloucester,” says the Report, “there are some facts which glared out in bold relief nearly half a century ago.”

“Colonel Webb’s own statement was vouched in proof of the assertion, that the contest in 1816 had cost him £27,500; and Admiral Sir Maurice Berkeley testified to the fact, that his expenditure at the election of 1818 amounted to upwards of £16,000. The non-resident freemen, who, previous to the year 1832, comprised the great bulk of the constituency, were brought, and often with their wives and families, at every contested election, from all parts of the kingdom to Gloucester, and there maintained at the expense of the candidates till the close of the election; the cost of taking up the freedom of those who, though qualified to be, had not yet been admitted to the privileges of freemen, was defrayed by the candidates; treating was universal; largesses, in the shape of payments for nominal services rendered by the voters, in the character of special constables, flag-bearers, bandsmen, chairmen, and messengers, were freely distributed; and, to crown all, head money, as it is generally believed, was paid to the electors at the Christmas succeeding each election, as a reward for past, and a propitiation for future favours.

“By this system, purity of election was wholly destroyed, and money rather than principle determined the voter in the exercise of his franchise. The Reform Act, although it mitigated, *failed to destroy the evil thus introduced*. It lopped off, indeed, a large and costly portion of the constituency; *but it retained the portion most calculated to infect by its presence the new class of electors whom it had created*. The freemen who, by the Reform Act, were reduced to 800 in number, and since then have decreased to their present number of 534, would probably have been diminished in a much larger ratio, had not their numbers been maintained by the continuance of a practice which has long been in mischievous operation in Gloucester. Before a man entitled to be free can be admitted to the privileges of a freeman; a payment of 13s. 6d. is required to be made, in discharge of the

expenses incurred by him in 'taking up his freedom.' This sum a considerable number of the embryo freemen are either unable or unwilling to pay, and they therefore apply to the agents of the respective political parties to which their fathers belonged, to defray the cost. It would be impossible now to ascertain the number of those who have owed their political existence as freemen to these gratuitous payments since the passing of the Reform Act; but we learned from Mr. Probert, junior, one of the registration agents of the Liberal party, that the freedom of as many as forty-one freemen had been 'taken up' by both parties during the years 1857, 1858, and 1859; and Mr. J. Browne, the registration agent for the Conservative party, stated that he had himself 'taken up' the freedom of at least a hundred freemen since the Reform Act, the greater portion of whom would not have cared to have acquired their freedom at their own expense.

"Such a system is essentially corrupt, and the evidence which we have received, and to which we shall hereafter refer in detail, has left on our minds, a strong impression that the perpetuation by such means of a class of electors whose hereditary corruption has greatly deteriorated the character of the constituency, is most calculated to nourish and permanently maintain the demoralization which we have found prevailing at Gloucester."

Now, much as we deplore the indifference to social duties, and the unfitness for political privileges displayed by the voters above described, it is impossible not to see that the candidates and their friends who systematically have laboured to inculcate and provoke, as well as profit by, the immoralities connected with the exercise of the franchise, ought more fittingly to be the object of our indignation.

No doubt, Gloucester and other boroughs, largely infected with an hereditary taint of freemen, are not fair examples of the working of our representative institutions. If they were, the sooner the House of Commons is utterly abolished the better. But the existence of such constituencies, and of such candidates as are found connected with this class of boroughs, are too numerous not to have an important effect upon the politics of England. Legislation, as we shall presently see, has been applied to the evil, but abortively, because it was not the result of a genuine attempt to root out the evil, but an affected (and some say hypocritical) compliance with the demand of the public

for an enactment which should repress outrageous corruption among parliamentary constituencies.

A perusal of the Report before us naturally suggests the division of the corrupt parties concerned in corrupt elections into the Bribers and the Bribed.

First, as to the Bribers. Within this class fall the candidates, their private friends, their kind relatives, their acknowledged agents, and their secret agents; which last class includes those subordinates who are kept to do the dirtiest work, and to which we may add central political clubs, and local political societies.

Now, the *candidates* and their private and judicious friends, from whose purses most of the polluting gold flows, either directly or indirectly, are, with rare and doubtful exceptions, those who are primarily responsible for the prevailing corruption. It is a humiliating fact—but one on which society should fix its eyes without flinching—that men (who at all events have not ignorance to plead, but possess sufficient ostensible position in the community to be proposed as representatives in the parliament of England) stand convicted of conniving at dishonest and dishonourable practices, which they either are forced to disguise by quibbles and disingenuousness, or of which they are convicted in spite of their denial. It is a degrading spectacle when men of wealth and education are seen making miserable attempts to suppress the truth, and suggest the false; explaining away, and glossing damning facts, or resorting to such subterfuges and paltry defences as street thieves and jail birds are wont to employ when they find themselves put on their trial: and yet after every general election this is of common occurrence. One recognises as a familiar phenomenon, the candidate who obviously connives at villainy being practised for his benefit, but is shameless enough to repudiate the fact, as he knows perjury can easily be brought home to him. Again, there is the candidate who tacitly consents to a constituency being demoralized by other hands, and cautiously shuts his eyes, winks and opens them at the right times, and gravely shakes his head at the correct moment. Such a man, when his conduct is called in question, is generally ready to ignore all consciousness of the

improprieties of his dear friends whom he had trusted implicitly; and who, in return, jealously protect him from any contact with any external impurity which could be proved against him. Which is the worse, the hardened offender or the hypocrite? Who cares? Each trusts with confidence to the laxity in the conventional morality of political clubs, and to the countenance of political party, for escaping expulsion from society even when he loses his seat in parliament for disgraceful conduct.

But who are those candidates, for the most part, who lend themselves to, if they do not initiate, this corruption, and who endeavour to profit by it? Who are the men who are so ambitious of a seat in parliament, that they will spend their thousands in breaking the law, and demoralizing boroughs and cheating the election committees? Who are these candidates who raise contests in St. Albans, Wakefield, and Gloucester, and other boroughs of the like character? Who are these Charlesworths, Leatham, Monks, Prices, and Cardens? Does the House of Commons receive, in the most inconceivably minute degree, any accession of honour, ability, wisdom, or political intelligence, by reason of these men being enabled to write M.P. after their otherwise obscure names? In former days, when great families ruined themselves in contesting a county, electioneering practices were demoralizing enough; but it was a contest between families, and politics was not even a colourable pretence for the conflict. But in the present day, men who have no recommendation—hereditary, personal, or social—for parliamentary position, though amply possessed of vanity, ready money,¹ blunted conscience, and vulgar hardihood, come forward in large numbers at every election, and enlarge and multiply the fields of corruption, and lower alike the character of the constituency and the dignity of the representative assembly.

Sir R. Carden was a Conservative candidate for Gloucester in 1857. He was neither locally nor commercially connected with Gloucester; but he had had ample experience of corrupt electioneering at St. Albans, where he says he was made the

¹ "A new class of monied candidate has just sprung up—a wealthy gentleman from the gold fields."

"victim of hypocrisy." He declared solemnly at Gloucester, that he would "trust to the basis of his own character, and to the free and unbiassed suffrages of the electors." But no sooner had the auspicious union between Sir Robert and the Gloucester Conservatives been effected, than—as the subordinate agents of this party confessed to the commissioners—"they began to treat and bribe the electors," and assured the constituents that, "if any money were going, they would receive their share of it." This was taken as a matter of course, and was part of a consistent plan from the beginning to the end of the election.

Carden is, we believe, the magistrate well known to the readers of police-court reports. He is commonly alleged to have any thing but success on the bench, and indeed some think that he brings unwittingly the criminal law into contempt in the city of London. He was called before the commissioners, and was just lucky enough to escape the legal consequences of his pursuit of political glory at Gloucester. Those, however, who have read the evidence relating to the part he took in the election, or have taken the trouble to read the report now before us, will know what is the effect of the proceedings upon the character of the candidates, and how far Sir R. Carden is implicated.

Carden paid £4,115, 13s. on account of his election and petition in 1857. But he declared he had *no idea* how much his election and how much his petition cost him. He had not indeed the slightest conception what had been the amount spent on his election. He had seen, it is true, the published report of the election auditor, but he really did not know what an election auditor meant; yet he was innocent enough to believe that the report stated the whole amount which had been expended in his election. Besides, he had an agent in whom he had such confidence that he could not suspect him, nor question him as to the way in which money had been expended. It is true, at St. Albans he had discovered how very corrupt a constituency may be, and how honest men like himself are made "the victims of the hypocrisy of other people;" but his experience at St. Albans, and knowledge of electioneering

matters, or of the character of Gloucester, never suggested to him the notion of guarding against connecting himself with the venality of the city. Further, it was proved that the distinction between the amount paid for the election and for the petition *had been* brought to his notice, and that he had before his eyes the sum he had paid for his election, over and above what was down to auditor's account! Mr. Lovegrove was the agent, who seems to have been a more honest man than his principal; for though on one occasion he deliberately made a statement to the commissioners which was not true, and which was intended to deceive them, he subsequently felt too great remorse to allow of his sticking to it, and came back the next day and confessed, with much contrition, his untruthfulness, and amended his tale. Now this Lovegrove stated plainly that Carden had asked him how much his election had cost him, and received full information thereon: Lovegrove indeed giving him a written statement, a copy of which was put in evidence, adding that Carden "was a man of business, and understood figures as well as any man in England," and did not put any questions about the way the money had been expended, on account of the suspicion which he must have known attached to them. Carden, on the other hand, repeats with great hardihood, he had no suspicion at all, when he paid his election bills, that he was repaying money spent in corruption; he paid the "lumps" of money he was asked for, in respect of the charges, "to get quit of them."

In the election of 1859, Carden had a dear friend, named Julian Bernard, who advanced in one instance £500 to be spent in bribery, and asked Carden for it afterwards. This transaction, in the detail which surrounded it, was very gross, and was brought home to Carden very completely; but owing to a loophole, which the commissioners thought they must leave for this high-principled candidate to escape by, he was not pronounced by them guilty of bribery. "I was sure the £500," says Carden, "must have been spent *improperly* (*i. e.* illegally), but *I cannot say I supposed it was spent on bribery—it might have been a fee to some man!*" Although, say the commissioners,

"we think there is great reason to believe that Sir R. Carden *must have known* that the money had been expended in the purchasing of votes, we hesitate to come to the conclusion, in direct opposition to his own *declaration to the contrary*, that he was guilty of bribery." We regret that they did so hesitate. For, although this man might possibly have escaped a conviction by lack of legal evidence, a prosecution would have exposed his malpractices; nor can there be any moral doubt in any man's mind, that he was perfectly aware that he would be expected to use illegitimate means to succeed in his election at Gloucester, that his friends and agents were doing his dirty work, and that he owed his election to the successful employment of his funds in illegal and dishonest practices. If any one wants an illustration of the personal demoralization which necessarily attaches to a man who engages in electioneering transactions like those belonging to Gloucester, he should read and ponder on the Report from which we have quoted, and gathered the foregoing facts.¹

With regard to the next class of bribers, that of friends and fellow-conspirators of the candidates, the revelations made in the Gloucester Report appears to put them, in a moral point of view, upon the same ignominious level as the candidates. The main use of a friend is that which induces a juvenile rogue to attach another to himself when he robs the apple-woman's stall; the one swears he did not take the apples, the other that he has not got them. We cannot well paint them in darker colours than they wear in those reports. The pretty complication on the Liberal side at Gloucester, affords a good illustration of the part they play. Here, Messrs. Monks, Moffat, Price, Ralli, and Sir W. Hayter were mixed up with rascally bribery agents like Thompson *alias* Thornton, and Clarke *alias* Brettles—men introduced to Sir W. Hayter as quite trustworthy by a respectable parliamentary agent. Secresy and indirectness were indispensable in those transactions, and so the friends and relations step in to save the candidate from interfering in matters which they hope thus to keep wrapt in mystery, (*vide* p. xiv.)

¹ *Parliamentary Report*, pp. xxii.—xxiv.

The *agents* in Gloucester were exceedingly low scoundrels; but we by no means desire to suggest that they were not just the men suited to their principals. One curious fact may here be noted. A mysterious £500, amongst other sums, was passed through several hands to the bribery agents, who had no doubt whatever as to the object of the money intrusted to them, whilst they from whom they received it were all quite innocent in the head, and had no notion that they were handing it over for rogues, to spend among a poor and mercenary population.

The political clubs in Gloucester, enrolled as friendly societies, were also part of the vicious machinery invented and kept up for corrupting the constituency for party and personal purposes, and we need not indicate their operation.

Turning now to the classes of *bribed* electors. These consisted chiefly of the commonplace corrupt voters, who took so much cash down as a matter of course. Many were ignorant men; who inherited, with the franchise, the notion that it was a thing to be bought and sold. Before and since the Reform bill, the educated and wealthy politicians taught them this doctrine, and they adhere to it, without much more sense of its being wrong than wreckers of old had when they made profit out of the misfortunes of the mariner. Another class is that which accepts treating and indirect advantages—mercenary miscreants who, with a vein of hypocrisy running through them, dislike being found out, and affect secrecy, protesting and prevaricating when charged with the sin. Perhaps within this class should be placed those voters who act, or pretend to act, as messengers at so much *per diem*. This is a patent means of corruption. It has accustomed the voter to connect the idea of pecuniary advantages with the exercise of the parliamentary franchise, which has led, by an almost insensible transition, from remuneration for services, more or less real, to the direct sale and purchase of votes. This messenger system is only a “colourable employment.” Indeed, as it is properly observed, “the employment of voters as paid messengers has a tendency, especially in the opinion of the lower class of voters, to confuse their notions of public morality.” The attorneys are hit hard by the commis-

sion on this point. They say there is a practice in Gloucester, of retaining all the attorneys whose professed political opinions concur with the party employing them, and that this produces a most prejudicial effect upon the tone of public opinion. They condescend to receive payments for exertions on behalf of their respective parties, which other gentlemen undertake gratuitously and on principle; and thus these attorneys not only degrade themselves, but set a bad example to the poorer voters. To hire "four-and-twenty lawyers at £25 a piece, and 2 guineas a-day besides, cannot be a proper arrangement," says one witness, "especially when a *poor man* is blamed for taking 3s. 6d. a-day as messenger."

In places where electoral corruption has so long prevailed as at Gloucester, there are many persons anxious to turn the occasion of an election to their own pecuniary advantage, and "their ingenuity in multiplying outlays at the expense of the candidates is considerable." But it is nothing short of a disreputable prostitution of the professional character for a body of lawyers, because they are lawyers, taking the money of candidates in the mode pursued at Gloucester.

Indeed, no profession or class in this city of iniquity seems to have escaped the infection of corruption, which is not confined, be it observed, to a pecuniary form, but assumes the shape of various other moral wickedness, not the least among which are treachery and falsehood. Falsehood is necessarily a vice attendant on transactions with people of the description which we meet with in the Gloucester Report. But it runs through the whole system, from the commencement of an election, when disreputable aldermen and dirty agents begin to set their abominations on foot, down to its very last scene. This indisposition for rectitude is fostered by many of the provisions of the statute relating to elections. Thus, the commissioners say—

"It is impossible to look upon the system of falsification which we found practised in Gloucester, without feeling that the 'election agent,' and the 'election auditor' exist only to deceive, and to delude the legislature and the public. Instead of the election auditor being the detector of electoral abuses, he acts

as a screen to prevent their exposure, and becomes a stumbling-block to further inquiry. The returns certifying the total expenditure at the two elections of 1857 and 1859, which, in obedience to an order of the House of Commons, were made to the House by the election auditor for Gloucester, *were grossly false.*"

The election auditor, in other words, gave facilities to the election agents to lie, and they lied accordingly. ¹

The commissioners have made some practical remarks upon the subject of this legislation, in discussing certain of the provisions of the "Corrupt Practices Prevention Act, 1854," which are worthy of attention. "The section," they observe, "which relates to irregular payments at elections, are sections 15—24.

"Under these enactments, the returning officer of every place returning members to Parliament, is required to appoint an 'election auditor,' and to give public notice of such appointment; and every candidate is required to declare to the election auditor the name of his agent for election expenses. All persons having claims on any candidate, are to send in the same to the candidate, or his authorized agent, within one month from the day of the declaration of the election; and every candidate or his agent must, within three months of the day of declaration, send in to the election auditor for payment all the claims so sent in to the candidate, and he must state whether he admits such claims to be correct. A candidate or his agent wilfully omitting to send in such claims is made liable to a penalty of £20, and a further penalty of £10 for every subsequent week of wilful neglect; such penalties to be recovered by any person who will sue for them. No payments whatever, in respect of any election (except such as are incurred before the nomination day, the payment of which cannot be conveniently postponed), are to be made except through the election auditor; and any payment otherwise made is to be deemed an illegal payment, rendering the candidate, on whose behalf it is made, liable to forfeit £10, with double the amount of such illegal payment and costs, to any person who will sue for the same. The candidate may name a banker, through whom alone money shall be paid by the election auditor. Where a banker is appointed, payments are to be made by cheques of the election auditor, countersigned by the candidate, or some person on his behalf specially appointed for the purpose.

"The personal expenses of candidates, and of advertising, are to be defrayed by themselves; but an account must be rendered to the election auditor, and included in his general account.

¹ Report, lxxiv.

"No person shall pay, or agree to pay, any expenses of an election, or any sum of money whatever, with a view to promote the election of a candidate, save to or under the authority of the election auditor, with some exceptions specially mentioned; and any person so doing becomes liable to a penalty of £50, and double the money paid.

"The election auditor is required to make out and sign an account of the expenses incurred at the election, specifying the money paid by him, or by his authority, on behalf of each candidate, including the amounts paid by the candidates for advertisements; and he is also required to insert an abstract of such accounts, signed by himself, in a local newspaper; such abstract to contain the particulars mentioned in the Act."

Now, the unanimous testimony of those best able to judge, affirms that "all these elaborate enactments are, practically, nugatory. Sir W. G. Hayter, who has large experience in the matters of elections, and the means by which elections are won, distinctly alleges more than once, that the 'act of parliament is uniformly disobeyed. I have never known,' says he, 'a contest of any sort, in which the funds have not been sent, notwithstanding that act.'" Mr. W. H. Cooke says, it was intended to be waste paper. Mr. Price, the late member for Gloucester, says, he never knew any member of the House of Commons who did not think and say it was "a delusion from beginning to end;" "it was never intended to have the slightest effect in checking corruption." Sir M. Berkeley concurs, adding, "that there is nothing to prevent a man sending in a false return, and so he sends in false returns." The witnesses therefore coincide, from intrinsic evidence and general experience, that the act was *never meant* by the legislature to effect a good object; and the commissioners conclude that it actually fosters corruption, and is made use of as a blind and a mask to screen it from detection. They further make some sensible suggestions upon the amendment of this branch of the law. "The evidence afforded by the elections at Gloucester shows," say the commissioners, "that all the professions of purity have not prevented corrupt expenditure, nor have they caused the observance of the law."

"We believe that, unless the expenses of elections shall be

strictly defined by Act of Parliament, and made payable exclusively by a public officer, and the prosecution of offenders for penalties imposed by the Act be made obligatory upon such officer; no law formed on the principle of the Corrupt Practices Prevention Act will afford any effectual check to illegal expenditure at elections. If the expenses to be incurred in an election were defined by Act of Parliament, and all other expenditure expressly forbidden, the election officer would be able, and might be authorized, to require each candidate to pay, before nomination, his estimated share of the election expenses. And if the election officer's authority extended to the expenses incurred prior to, as well as at the election, that undefinable and most expensive head of outlay and preliminary expenses would then be brought under effective control."

These are practical suggestions; but as the past legislature on the subject has been a deliberate sham, what guarantee have we for the future being genuine?

It is clear to us, on perusing the Blue-Book, that, had the voting in Gloucester been by ballot, some of the worst of the particular forms of corruption then developed would not have been put in operation. The ballot, for example, would have sown such distrust among the two classes of rogues—the bribers and the bribed (who always suspect each other, more or less)—that the former would not have wasted their funds on the chance of getting from the latter what they had been paid for. But at the same time, we also incline to believe that, with such a body of demoralized voters, and such a band of vicious corrupters, as frequent Gloucester during contested elections, other plans, *malgré* the ballot, would have been devised to have rendered the election impure.

There is yet another part of the Report which is very interesting at the present day, when the franchise is being altered, for which the commissioners merit our thanks. They say it appeared to them, during the progress of their inquiry, that the *condition in life*, and the pecuniary circumstances of many of the voters proved to have been bribed, were not such as to afford any palliation of their conduct upon the plea of poverty; but that, on the contrary, men apparently possessed of property, and occupying tenements of value much beyond the

minimum qualification for a household suffrage, received money for their votes. The commissioners, therefore, have obtained a return of the rental of all the voters proved to have been bribed at the election of 1859. In several cases it will be seen, some of these voters—quite “respectable men”—occupied their own property. In many others, the amount of rental ranges from £12 to £40.

Among the bribed freemen—122 in number—the rentals paid by two amounted to *thirty pounds*; we find also several rentals of £25, £20, £13, £10. There are some of £6, and some of £5; but the greater number of the rentals are above those sums. One hundred and twenty-eight householders proved to have been bribed, paid rentals above £10. Several twenty-five pound householders held their place among their poorer brethren, who mostly inhabit houses varying in value from £18 to £13. Poverty and corruption do not seem to be necessarily or so closely connected as sometimes supposed.

An undue appreciation of money is at the root of this political corruption, whether of the bribed or the briber; when each party thinks that money may be weighed against principle, then, wherever there is gold, a market may be made, whatever may be the amount of property of the voters.

On a late occasion, Lord Brougham denounced the political corruption in language which deserves to be recollected. He expressed the feelings of every honest politician when he declared his abhorrence of the wide-spread crime. The law cannot do every thing; in some things it can do nothing. If the heart and voice of society is against its decrees, however skilfully and wisely these may be prepared, they will be futile. If the general feeling of the public be indifferent to political honesty, and to the exercise of immoral influences over parliamentary representation, the legislation will have, as it has heretofore had, no beneficial result, though proper provisions be enacted with the best of intentions.

But we do not believe that this is the state of society; and we do believe that, if stringent enactments be passed by practical men who know the working of our electoral system, we should

find a cure for the malady which now prevails in many places. Corrupt practices might readily be made disgraceful, and no man who values his position in society as a gentleman, would then be found willing to connect himself with such dirty people, and dirty conduct, as we read of in the Report of the Gloucester Election Commission; especially when shameful consequences would legally follow from shameful conduct.

ART. IX—JOINT-STOCK COMPANIES.

Draft of a Bill "for the Incorporation, Regulation, and Winding-up of Trading Companies and other Associations," brought into the House of Lords by the LORD CHANCELLOR, 6th Feb., 1860.

"THESE are our failures," exclaimed Beau Brummell's valet; and the appearance of a new bill for Joint-Stock Companies is a sure token that the old are failures. The acme of perfection in legislation, like the exact sit of a neck-tie, is not to be attained without effort, and involves many disappointments. All acquainted with the intricacies and anomalies of the present acts regulating Joint-Stock Companies, agree in condemning them as a confused series of disjointed and contradictory statutes. They are a stumbling-block to the profession, and a riddle to the bench. Knowledge of their prescriptions is a happy legal fiction. In vain do the acutest of the judicial phalanx, whose duty it is to expound the law for the edification of the vulgar, groan beneath a burden too heavy for practised acumen to bear; in vain do the most painstaking labour to obtain a clue to the maze; the gordian knot is too intricate to untie, the sword of judicial decision is powerless to cut it; judgment confutes judgment; and the law on the subject remains what one of the ornaments of the bench has aptly described it, "a perfect chaos of legislation." A sound measure, reforming it altogether, would be a real boon. Nothing has so obstructed the healthy develop-

ment of the joint-stock principle, as this uncertainty of the law. It is, indeed, painful to reflect upon the money cost of its elucidation.

Guarding ourselves from being accepted as positive in a matter where so much uncertainty prevails, we think we may hazard the assertion that there are at the present time no less than six separate and distinct Codes of statutory regulations governing the constitution of Joint-Stock Companies.

First, there is the Code which comprises the statute 7 Geo. IV., c. 46, and seven amending acts.¹ This Code applies to all such Joint-Stock Banking Companies as were formed prior to May, 1844 (see 7 & 8 Vict., c. 113), and have not been registered under 20 & 21 Vict., c. 49.

Secondly, there is the Code which comprises the Joint-Stock Banking Companies Acts, 1857 & 1858 (20 & 21 Vict., c. 49,² and 21 & 22 Vict., c. 91), and their amending Act (21 & 22 Vict., c. 60). This Code applies to Banking Companies formed since May 1844, and to similar companies formed before that date if registered under these Acts.

Thirdly, there is the Code which comprises the statute 7 & 8 Vict., c. 110, and two amending Acts. This Code applies to Insurance Companies, and to any other companies which may have been registered under that statute, and not under the Joint-Stock Companies Act 1856 (19 & 20 Vict., c. 47).

Fourthly, there is the Code which comprises the Joint-Stock Companies' Acts, 1856, 1857 (19 & 20 Vict., c. 47, and 20 & 21 Vict., c. 14), and an amending Act (21 & 22 Vict., c. 60), and which relates to all Joint-Stock Companies registered under those Acts.

Fifthly, there is the statute which regulates companies established by Letters-Patent (7 Will. 4, & 1 Vict., c. 73).

¹ An excellent treatise on the Law of Partnership, and its application to Companies, has recently appeared from the pen of Mr. Lindley. In an appendix, Mr. Lindley has set forth all the statutes affecting Joint-Stock and other Companies, and tabulated them in such form, that at a glance it may be ascertained what statutes are still in force, and what statutes have been repealed or amended.

² This Act *extended* the Joint-Stock Companies' Acts 1856-7 to Banking Companies.

And sixthly, there is "The Companies Clauses Consolidation Act, 1845" (8 & 9 Vict., c. 16), which regulates companies constituted by special Acts of Parliament.

The Acts to which we have referred relate to the creation and regulation of Joint-Stock Companies during the period of their existence. As to the winding up of effete companies, there are several existing modes of procedure under separate Acts of Parliament.

First. A company not within the provisions of the Acts of 1856-8, may be wound up in Basinghall Street under the provisions of the statute 7 & 8 Vict., c. 111, and the Acts amending it; but whether railway companies incorporated by act of parliament can be wound up under those Acts is a question which seems to be doubtful.¹

Secondly, A company, not being a railway company incorporated by Act of Parliament, and not within the provisions of the Acts of 1856-8, may be wound up by the Court of Chancery under the winding-up Acts of 1848-9 (11 & 12 Vict., c. 45, and 12 & 13 Vict. c. 108), and their amending Act.

Thirdly, A railway company empowered to make a railway by an Act of Parliament passed before August 1850, may be wound up under the 13 & 14 Vict., c. 83,² by the Commissioners of Railways.

And fourthly, Companies within the provisions of the Acts of 1856-8, may be dissolved and wound up under those acts on the petition of a creditor or contributory.

Each and all of the principal statutes referred to above, are lengthy acts of many sections, each section bristling with points. When to this is added the fact, that a company, like a chameleon, may be one thing to-day and another to-morrow; may be a company under one code at starting, and may change its colour and become a company under another afterwards—thus embody-

¹Lindley, p. 1031.

²It appears that there is no statutory provision for the winding-up of railway companies incorporated by act of parliament passed after August 1850 (Lindley, p. 1031). The 9 & 10 Vict., c. 28 (Lord Dalhousie's Act), provides for the winding-up of railway companies projected before 1846, and not incorporated by statute. This Act is of course now of no practical utility (Lindley p. 1163.)

ing in itself the interesting varieties of different acts—some idea may be formed of the excitement of a legal hunt through these various statutes.

A memorable illustration occurs in the instance of the Royal British Bank (2 Jur. N. S. 1111; 3 ib. 95¹), for whose corpse a battle-royal ensued between the officials of Basinghall Street and of Chancery Lane; each asserting conflicting statutory titles, the dispute being ended by the claim of Basinghall Street to the assets being confirmed; whilst to Chancery was reserved the right to persecute the contributories for calls. Another example of the benefits of the existing system is to be found in the Welsh Potosi Co., being wound up both in Bankruptcy and in Chancery at the same time; in the one case, in its character of a limited company under the Acts of 1856 and 1857, and in the other in its previous condition of an unlimited company, under the Acts of 1848 and 1849.

Simultaneously with the winding-up by the Court, creditors were allowed to pursue their ordinary common-law remedies of obtaining judgment against the corporation, and of issuing execution thereon against each and all of the shareholders; but so great was the scandal occasioned by the free exercise of this privilege in the case of the British Bank, that an Act was passed (20 & 21 Vic., c. 78) specially to control such proceedings upon the commencement of a winding-up; the creditors being entitled to appoint a representative to watch their interests in that stage.

We must here again remind the reader, that we have put forward the above brief outline of the main branches of the statute law affecting joint-stock companies with the greatest possible diffidence, and we are by no means confident that we have correctly stated the result of sections repealing and unrepealing, enacting and re-enacting the law upon the subject. But whether our apprehension of the matter be absolutely correct or not, it is obvious that there is much room for improvement, by judicious consolidation and amendment, of this

¹ Reported as *Aitchison v. Lee*, 3 Drew. 637.

branch of the law. The main requirement is simplification. Life is short, and business men cannot devote the whole of their allotted space to the reading of Acts of Parliament. The length of modern acts is an intolerable grievance. Every session, new acts are added to the previous accumulation, until both common law and common sense are buried beneath a mass of cumbrous verbiage.

There are two sorts of consolidation ; the one proceeding upon a clear conception of the object to be attained, and effecting it by a few simple provisions expressed in plain language ; the other merely codifying existing enactments, and embodying all the previous anomalies in one act, with the additional inconvenience of a new context.

The desideratum with regard to Joint-Stock Companies is a comprehensible Act of Parliament conferring the privileges of incorporation upon trading companies, with its incidental advantage of restricting the liability of component members to the amount they individually undertake to subscribe, and providing a summary means of winding up such companies, when from circumstances they cease to have a beneficial existence. In other words, what is wanted is a legal status for such companies, endowing them with vitality, with powers of speech and action as an individual, and with a means of determining their continuance, and of settling their affairs when it becomes necessary or desirable. The privilege has, in fact, been conferred on all trading companies, as the law stands, with the strange exception of insurance companies, where the limitation of liability has long been achieved in another way, by special clauses in all policies granted. By a singular caprice of parliament, the only class of companies to which a limited liability of members is denied in theory, is the one in which that limitation has long been in fact secured by the mode in which their business is transacted.

The bill now before parliament was introduced into the House of Lords by the Lord Chancellor ; but, to our apprehension, it does not bear the impress of deliberate consideration. Judging from its enactments, we are led to suppose that the whole of the

former acts were submitted to a young conveyancer, with instructions to prepare a new act embodying all the existing anomalies. This task has been most faithfully performed; for the bill religiously embalms all the inconsistencies, absurdities, and incongruities of the existing enactments, and it superadds, moreover, some fresh elements of confusion. The main error, as it appears to us, has been not the making of too few, but the enactment of too many provisions.

What strikes us as most odd is, that with a code already upon the statute book which for years has satisfactorily regulated all corporations created by special Act of Parliament (we allude to "The Companies Clauses Consolidation Act, 1845"), and which at least possesses the recommendation of having stood the test of fifteen years' experience and judicial construction, with the rare merit of not having required an amendment act to explain, alter, or rectify its provisions, our law-makers should have needlessly taxed their own ingenuity, and the patience of the public, in the introduction of codes which have required perpetual cobbling and amendment.

The best solution of present complications would, it is conceived, be to sweep away the whole of the other codes, and to enact that all companies may constitute themselves on the same foundation as companies incorporated by special Act of Parliament. A short act of few sections would accomplish that result. This course would reduce all companies to one standard general act regulating their formation, and would eliminate that variety of constitution which is a fruitful source of confusion and doubt. With regard to winding-up, a new provision would have to be made. This could be done in a simple manner, by vesting an absolute discretion in the Court of Chancery, upon the petition in a summary way of a creditor or contributory, both as to the expediency of winding up, and the course to be pursued; all prescription is useless, as the discretion of the court must be the *ultima ratio*, whilst the attempt to anticipate the ever-varying circumstances of each peculiar case, only forges fetters restricting its beneficial action.

The present division of winding-up into voluntary, compulsory, and voluntary under the supervision of the court, seems a superfluous refinement, a distinction without a difference, as the court is the best judge of the most expedient course to adopt in each case as it comes before it, and its jurisdiction is the basis of all three.

Our objection to the bill before parliament is, that so far from simplifying it only increases the present entanglements. To the existing divisions of companies into limited and unlimited, or corporations proper, in which a shareholder's liability is limited to his proportionate part of the capital, and *quasi* corporations, in which he is responsible for the whole amount of the common liability, the bill adds a new hybrid class, called a company "limited by guarantee." There is no necessity for any such newfangled experiment, which provides no facility not open under the present law.

The bill retains both a memorandum and articles of association; this is one of the mistakes of 1856. One or other is superfluous. Both cannot be necessary. When they do not differ, they are useless iteration of the fundamental principles of the company's constitution; where they do differ, a "mess" is the result.

Part IV. of the bill contains novel definitions of contributories fraught with peril to the public. So far as we know, the Court of Chancery, whatever else may be its faults, is not chargeable with undue mercy towards alleged contributories. The draftsman of this bill, however, appears to have entertained a contrary opinion. The bill defines an existing member *de facto* to be any one who has agreed to be a member, and whose name is on the register, and is not shewn by it to have ceased to be a member. The test is vague enough; but surely it is too bad that a wilful or accidental entry or omission by the secretary should be sufficient to saddle a man, who ought not *de jure* to be on the register, with the liabilities of membership. Again, any one not registered, who has agreed to take a share, is to be constructively a member; that is to say, though not entitled to the rights and profits of a shareholder, his simple

agreement, not acted on by the company, is to bind him as a contributory—a new principle in law not deducible from pure ethics. Moreover, the personal representatives of a deceased member receiving dividends are to be constructively members.

But the doctrine of constructive membership becomes positively alarming in sec. 75, whereby persons who have not even agreed to be members, may be deemed existing members by reason of certain dealings not described with any approach to clearness, thus applying the most objectionable of the anomalous decisions as to private partnerships to public companies. Sec. 78, again, in making an equitable owner of shares liable to contribute, goes far to deprive shares of their employment as mere securities, by bringing a mortgagee or deposittee within danger of a winding-up.

The ordinary perils of the law are quite sufficient without this refinement of legal torture, which endeavours by arbitrary enactment to involve all persons, whether members *de facto* or *de jure*, or contrary to the fact, or contrary to right, in one common and entangled liability; so that English law will approach the perfection of Neapolitan police practice, which treats it as a crime to be suspected of having known or sent your compliments to a proscribed person. A company is evidently "suspect" according to the notions of our lawgivers; and to have known a secretary, or sent your respects to a director of a company, will, if this act become law, be sufficient to doom you to the penalties of a contributory.

Upon the winding-up part of the Bill, our impression accords with that of Mr. Ludlow, the reputed author of the winding-up Acts 1848 and 1849, that it is mainly a question of procedure. The Court of Chancery has original jurisdiction in all partnership matters, and what is wanted is ready access to the court, which ought to see to its own orders, and to their own observance without parliamentary shackles. In one respect the new Bill is an improvement in extending the winding-up power to unregistered companies; but it might profitably be carried further still, by dealing with all partnership concerns on summary application to the court.

Regarding this Bill as one for the constitution and regulation of Joint-Stock Companies, we cannot give it our approval. We think the whole of the useless Joint-Stock Law and legislation, now encumbering the statute-book, ought to be swept away, and the statute 8 & 9 Vict., c. 16, accepted as the standard Act for all Joint-Stock Companies. We are, however, not wedded to this opinion, and should not object to one new code of simple provisions, applicable to all trading companies not otherwise incorporated; but we feel called upon to protest against the present measure as a mass of complicated, intricate, and objectionable provisions, aggravating present evils; and if put to our election, to abide by the law as it is, or to accept this Bill as the alternative amendment, we should unhesitatingly prefer "to bear those ills we have," rather than "fly to others that we know not of."

A *sine quâ non* in any consolidation on this subject, is to render the new act compulsory on existing as well as on future companies; for little is gained by making an act for future companies, leaving the existing companies at liberty to avail themselves of it or not, as they may please. This cannot be done by an *ex post facto* law that companies registered under certain of the former acts are to be deemed to have been registered under the new act; because there are many companies not included in that category, and in those that are, the divergencies between the acts done away with, and the act substituted, becomes a diverting legal struggle.

So far as we can understand the present Bill, it renders registration of existing companies permissive only; but what may be the condition of companies registered under acts now to be repealed, which do not avail themselves of that permission, is one of those ingenious puzzles which these crude essays at legislation are constantly presenting, and which forcibly impress upon the mind the question of Montesquieu—"Le mal de changer est-il toujours moins grand que le mal de souffrir?"

ART. X.—THE LAW AND LAWYERS IN THE BRITISH COLONIES.

A LONDON lawyer, when he hears of "the legal profession," has brought before his mental vision so much of the world of lawyers as is described in a considerable portion of a neat red book, which, published annually by that respectable firm Stevens & Norton, calls itself "The Law List:" for the significance of terms depends upon the limits and exactitude of a man's knowledge, and by far the greater number of barristers and solicitors in England, have rarely any thing to do with either their foreign or colonial brethren. In this busy bustling world, the inhabitants, both of the old country and the younger one, find it essential to concentrate their attention on their own affairs; and, having no direct occasion to meditate upon systems and practices foreign to their own, they do not make the opportunity.

Of course there are exceptions to this exclusive attention of lawyers to their own local interests and pursuits; but, owing to the incurious character, the speculative inactivity, and the narrowed and practical quality of the national mind, we certainly maintain an extensive ignorance of the law and lawyers of those mighty colonial provinces, which either have created their own systems of jurisprudence, or exercise their jurisdiction under the authority of the British crown.

It would, indeed, form a somewhat heterogeneous body of law, if all the colonial procedures and statutory enactments were collected. But we believe we may safely affirm that there are, in the administration of the law throughout our colonies, two general distinguishing characteristics; the one the unimpeachable integrity of the Bench, and the other the independence of the advocates. Wherever the English people have emigrated, they have carried with them an invincible love of judicial impartiality. No name in the annals of English history is so hated as that of Jefferies. A venal, corrupt, or partial judge, who is open to

suggestions off the Bench, or who exhibits partisanship or courtier-like subserviency on it, is certainly the most detested character among us. We believe the impress of integrity has been stamped universally on the character of our judicial officers; nor can there be any doubt that this is of more importance than the possession of the most perfect code, or a staff of the most perfectly taught lawyers in the world. In some civilized countries the private suitor has no chance against the government; while, in others, the characters of judge and prosecutor are combined in one person: and we read occasionally of the court of justice being transformed into a scene at a theatre, where the judge is only one of the *corps dramatique*.

When, however, there is a free exercise of the profession of the advocate, whether he unites the characters of barrister and solicitor, or they remain distinct, the effect mutually on judge and advocate is necessarily favourable to the administration of justice; and it is this exercise of the profession of the law in open court which is the great safeguard for the community. The mere forms of court practice are of little worth in comparison with the open administration of justice, with the aid of independent advocates, in the presence of the public. In the back woods or young settlements the forms may be rude; but if tradition has maintained the spirit of the English administration of the law in this respect, the essential part of its character will have been preserved.

The etiquette of the profession, as well as the forms of justice, depends upon the *accidents* of society where its members flourish. Modern refinement, for example, in relation to *honoraria*, in which the fiction is affected to be believed, that counsel are not paid as an apothecary or turnpike-man, and where a mysterious silence pervades the whole money part of the transaction, does not hold in new and old world settlements. A good fellow who kept terms with us, migrated to a young colony which shall here be nameless, and there alternately pursued his profession and the beasts of the field and wood; but he felt some difficulty in getting such endorsements on his brief as would be acceptable

in the Temple. The doctrine that "the fee should always be put outside," was indeed strictly enforcible in many cases with him; for the hides and horns, &c. (which represented in his case the "guas"), were, *odoris causâ*, necessarily left external to his hut. Although here all forms of *honoraria*, and often in kind, were tendered, and obliged to be accepted, our friend was never the worse lawyer, or less respectable as an advocate. Happy would it be for the legal professors in the "old country" if clients always paid as regularly, and barristers always dealt as honourably, as our successful, skilful, and learned colonial friend, whose fee-book would be a curiosity of the greatest magnitude in Lincoln's Inn.

It is always with pleasure that we see the Upper Canada Law Journal¹ (conducted by Messrs Ardagh and R. A. Harrison); for it affords evidences that the science of jurisprudence flourishes; and that the legal press is well represented in that province. The matter it contains is, so far as we have seen, excellently selected for the use of lawyers, while in literary character it takes a high standing; and, as regards printing and office preparation, is superior to much which emanates from the press of the mother country, and affords satisfactory evidence of the talent of the legal profession in Upper Canada.

The advertising sheet of the periodical in question might, perhaps, shock the sensitive feelings of the stuck-up mother-country practitioner, for barrister and solicitor advertise in it as a matter of course. We confess we like to see their straightforward announcements, like the following:—

"PATERSON, HARRISON, and HODGINS, Barristers, Solicitors in Chancery, &c. Office Toronto Street (two doors south of the Post Office), Toronto, C. W."

"SHERWOOD, STEELE, and SCHOFIELD, Barristers and Solicitors, &c., MacLaughlin Buildings, Sparke Street, Central Ottawa.

"Hon. G. SHERWOOD; R. F. STEELE; F. SCHOFIELD."

¹Published at Toronto, monthly.

“ROBERT K. A. NICHOL, Barrister and Attorney-at-Law, Conveyancer, Solicitor in Chancery, Notary Public, &c., Vienna, C. W.”

In England, we advertise in a different way in the newspapers, thus—

“The Lands Draining Act, 1859, with copious Notes and Index. Edited by JOB BRIEFLESS, ESQ., Barrister-at-law;” or, “The Metropolitan Housemaids’ Window-cleaning Protection Act, 1860; with an Introduction and Notes, by JEREMIAH HOPEFUL, Barrister-at-law.” On the whole, the Canada principle of advertising is at least as admirable as our own. Besides the popular form of advertising in London, some members of our liberal profession, we have heard, adopt other modes of preventing their dips being hid under bushels; but we need not further advert to their ingenious efforts.

In Upper Canada, it will be seen, the same men practise both as solicitors and barristers, and form themselves into firms. The practice is recommended by good sense and reason. The state of society no doubt favours the combination, and much might be said for the system in England, were it *openly* adopted with us. A paper issued by the Law Amendment Society, published in 1852, on the relation between the Bar, the Attorney, and the Client, affords ample evidence of what is the opinion amongst liberal-minded men in the profession on this subject.

Before we close these brief observations upon our colonial brethren, we will refer to one point which presents itself to our minds; and that is legal education. England furnishes some of the judges and other officers for the colonies, and from home are drafted not a few lawyers who practise in our dependencies. There ought to be ample provision made here for a liberal education in the *principles* of jurisprudence, apart from practice and technical knowledge, such as are gained in counsel’s chambers. Without these principles a man goes to a new system or variation of the English procedure at a great disadvantage, and when put to apply Law to a new procedure, he feels

how deficient his studies and how misdirected his labours have been. It is the opprobrium of the English advocate that he is unacquainted with the science of jurisprudence, for which any amount of mere technical knowledge is no compensation. When he is called on to comprehend a foreign juridical system, he will find that Chitty's Archbold, and Smith's Chancery Practice, are not the only works worth his mastering.

ART. XI.—LEGISLATION ON BANKRUPTCY AND INSOLVENCY.

Draft of a Bill "to Amend and Consolidate the Laws relating to Bankruptcy and Insolvency in England." Introduced by
SIR RICHARD BETHELL, 13th March, 1860.

THE laws relating to bankrupts have been frequently amended and altered since the Consolidation Statute of 1826, besides being again reformed and consolidated in 1849; but it would seem that the more this branch of commercial jurisprudence is meddled with, the greater are the evils complained of by the trading classes. A "Bill for Assimilating and Amending the Law relating to Bankruptcy and Insolvency," was promised in the Royal Speech on opening the session of the last Parliament in February, 1859; and a bill, which dealt with the whole law of debtor and creditor, was vehemently pressed by Lord Chelmsford when Chancellor, but, after encountering condemnation as well by the mercantile as the legal interests, that production went the way of many predecessors. Last November the merchants went up in force to lay their grievances before Lord Palmerston, and the premier promised them a bill which should satisfy all reasonable demands—a bold promise, seeing that, from the time of the first efforts in consolidation of statutes, these unfortunate laws have been made the subject of experiment; that ever since the passing of the Consolidation Act of 1849, amateur law-makers and parliamentary rivals had sought to obtain selfish ends or political capital by schemes of bankruptcy

law reform; and that reports of royal commissioners and of parliamentary committees, and bills short-lived and fleeting, had constituted what the Lord Chancellor of Ireland called a succession of dissolving views before Parliament and the country.

Bankruptcy Law Reform, which has thus been a sort of *bête noire* of successive Attorney-Generals and reforming Chancellors, and a shuttlecock of successive administrations, therefore descended upon Sir Richard Bethell, who has now produced a bill in which he not only makes concession to "reasonable demands;" but, yielding to a clamour founded partly on delusive averages, and more, we fear, on selfish and interested aims, proposes reforms more sweeping than salutary, and a return, in some important particulars, to the bad old system of Lord Eldon's time, which even that inveterate perpetuator of abuses denounced. It is a bill of most formidable length, containing no fewer than 538 clauses, dealing with the whole law of bankruptcy as well as the constitution of the court, and repealing about twenty Acts of Parliament, besides providing for an entirely new mode of procedure.

It seems to be admitted on all hands that the existing laws in bankruptcy need amendment; but the difficulties are great, the views of bankruptcy reformers are conflicting, and the demands of the mercantile associations, in many respects, unreasonable as well as irreconcilable. High legal authorities in Parliament, moreover, are not agreed as to the principles on which the reform should be undertaken. There is great difference of opinion as to the expediency of dealing with the insolvency of non-traders according to the laws relating to bankrupts, and giving one tribunal the jurisdiction over both; as to sanctioning private trusts, voluntary deeds, and arrangements not made under judicial control; as to mitigating or rendering more stringent the penalties for offences against the bankrupt laws; as to attempting by any certificate or discharge, to distinguish the unfortunate but honest, from the fraudulent or censurable debtor; as to transferring to the creditors the duties of the official assignee, and as to lessening the expenses to creditors, by throwing the cost of the court on the consolidated fund.

Seeing that difficulties thus surround the task, it is, of course, not surprising that the name of Lord John Russell should appear as one of the sponsors for the portentous bill now before Parliament; but the learned Attorney-General must not infer, from the favourable reception of his able introduction of the subject to the House of Commons, that he has been successful in this, his first, attempt at bankruptcy law reform. He was admonished by the *Times* in November last, to approach his task neither from an exclusively lawyer's nor an exclusively creditor's point of view; not to dip into the public purse in order to collect the bad debts of traders, nor oppress creditors with taxation for the consequences of former legislative caprice; not to enact stringent laws against debtors in order to indemnify creditors for their neglect of prudent precautions; nor to give power to them to hush up trading delinquencies in their own way. The Attorney-General certainly has not regarded his subject from a lawyer's point of view, but he seems to have done nearly all the other things he was admonished not to do.

There is no great difference of opinion as to the chief objects at which bankruptcy legislation should aim. It seems to be agreed that the most important are, to prevent abuse of credit, and promote honest trading; to diminish the frequency and extent of mercantile failures; to administer assets with the least possible expense, formality, or delay; to prevent undue preferences by a failing debtor, and control the power of a selfish creditor; and to establish a tribunal "from whose righteous judgment the honest but unfortunate debtor may expect solace and relief, and the fraudulent, punishment and shame." Bankruptcy jurisdiction, therefore, has the twofold object of, 1st, the collection, and the cheap, speedy, and equitable distribution of assets; and, 2nd, the discovery and punishment of trading delinquencies.

First, then, as to the judicial and administrative constitution and machinery of the court. The changes proposed by the Attorney-General's bill are of a most startling character; they involve the immediate abolition of the Courts of the Commissioners in London, and the appointment of one judge, who is to take rank

with the judges of Westminster Hall; the appointment of an assistant judge for a "London District Court;" and, on the happening of vacancies in the office of commissioner in the seven country districts, the transfer of his jurisdiction to the County Courts. The proposed changes involve also a sweeping reorganization of the existing system of administration, and give the creditors power to dispense with the services of the official assignee.

The bill not only thus remodels the existing jurisdiction in bankruptcy; it proposes to abolish the commissioners in Portugal Street as judges of the Insolvent Debtors' Court; to amalgamate the hitherto separate systems of bankruptcy and insolvency—or rather, to subject all debtors to bankruptcy, whether traders or non-traders, and to give part of the jurisdiction now exercised by the Insolvent Debtors' Court to the assistant judge in bankruptcy, and to the Country District Courts. All estates under £500, in the London district, are to go before the assistant judge.

The bill, moreover, proposes to engraft bankruptcy jurisdiction on the County Courts. In the country districts, all cases under £300 are to be at once transferred to a County Court; and, by vote of a majority of the creditors, cases (arising after the passing of the bill) where the assets are under £1000 may likewise be transferred. And on a vacancy in the office of commissioner all jurisdiction may be transferred, as already stated, to the County Courts, and an additional County Court in any bankruptcy district may be constituted.

In London and in the country districts, proofs of debt, examinations, and other administrative business, now passing before a commissioner, are to be conducted in chambers before the registrars.

The Attorney-General objects to the mixture of judicial and administrative functions in the commissioner. He says, a small proportion of the time of the London commissioners is occupied judicially, and that the transfer of their administrative functions to the registrars will admit of the judicial business of the chief court being discharged by the single judge proposed to be appointed, with the very becoming salary of £5000 a-year. As

regards the London district, we see no objection to this arrangement, nor to the performance by the registrars in the country districts of the administrative business of each court; but we strongly disapprove of the proposal to abolish the country commissioners on the happening of vacancies, and to the future transfer of the whole, and the present transfer of any part, of their jurisdiction to the County Courts. As in each of the country districts judicial functions must continue to be exercised upon the spot, and as, moreover, the bill is framed for the purpose of bringing a great increase of business to the courts, we do not see that, after the deaths of existing commissioners, any thing beyond the saving of their salaries is proposed to be gained by giving jurisdiction to the County Courts; and *that* prospective advantage would be very dearly bought by the divided jurisdiction; and the grievous uncertainty of decision that it would introduce. But there are other objections to such a transfer, which appear to us entirely to outweigh any advantages that could result from it, which must at best be limited to the prospective reduction of expense, and the convenience to parties where the County Court town happens to be nearer than the district court to the scene of the bankruptcy. If we understand the proposal aright, the proceedings liable to be removed will originate before the existing commissioners in country districts (as long as there are any commissioners), but will be transferred after adjudication. Such a change would remove estates from a court which is duly constituted with administrative machinery, and vest them in a court which has no such machinery—from a court which is stationary and open daily, to one which is ambulatory and sits only periodically—and from functionaries trained in bankruptcy administration to others who are at least without any experience in it. With all due respect for the high attainments and character of most of the judges of the County Courts, it may be asked whether they are always qualified to deal with the intricate questions which arise in bankruptcy? Perhaps it is intended to follow the change by an act of uniformity; at all events there is likely to be full employment for the Court of Appeal, and little prospect of

uniform interpretation of this branch of mercantile law. Or perhaps it is supposed that a knowledge of it comes to a County Court judge by nature, as Dogberry says reading and writing come. It is one of the complaints now made by creditors, that there is a want of uniformity in the decisions of the commissioners; yet the proposal of the Attorney-General (which seems only to repeat that of Lord John Russell in 1859) would split up the jurisdiction among sixty different judges! The Royal Commissioners (of Bankruptcy Inquiry, 1854) remark (Rep. p. xli.), that the District Courts established in 1842, were specially designed to cure the evils incident to a distribution of bankruptcy business amongst a variety of distinct and independent courts. Many of those evils, besides all sorts of pernicious local and personal influences, would probably result from the proposed distribution. Even in the few cases where the creditors chiefly reside at the "scene of the bankruptcy," and this happens to be a County Court town, what advantage can the County Court possess over the District Court of Bankruptcy, which can cause sittings to be held in any part of the district? We are persuaded that the bankruptcy jurisdiction is already sufficiently localised by the District Courts; and if the object of the change is the ultimate saving of the commissioners' salaries, now charged on the fund to which estates contribute, why not transfer that charge to the Consolidated Fund, which is to pay the salary of the chief judge, besides a present addition of £300 a-year to the salaries of the County Court judges? Their salaries must of course be further increased when extended bankruptcy jurisdiction shall vest in them, and where will be the saving of expense? If it is proper to continue to the existing commissioners their jurisdiction on certificate questions and other contentious business of bankruptcy, and their present judicial functions, we cannot understand why a different system should be introduced, and every thing thrown into confusion on the happening of a vacancy in the office of Commissioner, nor how it can be possible to dispense in the country districts with a tribunal of similar constitution to the chief court in London. Indeed, one can hardly conceive it to

be seriously intended that the existing districts shall be split up, and the jurisdiction now exercised by eight judges be divided amongst sixty, who are to become, as it were, the wandering asteroids of the judicial firmament.

That the existing system is unpopular with creditors there can be no doubt; the expense of administering an estate in bankruptcy seems to be placed at the head and front of the causes of dissatisfaction. Creditors complain, too, that the law is not sufficiently stringent for the punishment of fraud; they object to the present classification of certificates; they complain that they have not sufficient control in the administration of their debtor's estate; and that they are subjected to inconvenience and expense by having to travel to the District Court. They object to the publicity of certain inquiries, and of the proof of debts; and they quarrel with the official assignee as a functionary, who, though sent by legislative providence for the protection of estates, swallows them up as the Stork swallowed the discontented Frogs.

We may say at once that we see no foundation for the complaint that creditors have not a sufficient control in the administration of their debtor's estate; we do not believe that any real or removable hardship results from the distance in some cases of the District Court from the scene of the bankruptcy; and we do not see how the provisions designed for the prevention of offences against the policy of the bankrupt law, can be less inquisitorial and penal than they are.

It has been very truly said, that a large number of malcontents will never be satisfied until they can again nominate their own commissioners to sit in a room at an inn, their own assignees and their own banker; can imprison their debtor, and grant or withhold his discharge at their own caprice, and conduct the administration of an estate in their own way. Excepting as regards the debtor's discharge, Sir Richard Bethell's bill goes far towards restoring to creditors these ancient privileges; but it is a hopeless task to conciliate the demands of mercantile associations, or reconcile the conflicting views of theorists, or legislate by way of compromise, as Lord Chelms-

ford attempted to do by his Bankruptcy bill in 1859. A much safer guide to useful legislation will be found in the lessons of experience, and the reports and evidence already in the blue books of parliament.

We have glanced at the complaints of creditors: debtors, it is said, also dread the court, and are deterred from resorting voluntarily to liquidation by means of bankruptcy, because of the stigma conveyed in the mere name of "bankrupt," the publicity of investigation, the stringent and penal character of the category of offences, and the want of some obvious testimony to distinguish from the fraudulent bankrupt, the debtor whose bankruptcy is found to have been attributable to unavoidable losses and misfortunes. The compulsory sale of a bankrupt's furniture, and the consequent breaking up of his home, is also complained of as an unnecessary harshness. As to needless publicity, the Attorney-General's bill (though in a less degree than Lord Chelmsford's) proposes to mitigate the evil; and, as to distinguishing the honest from the dishonest debtor, the pending bill provides a special finding by the court on the face of the discharge, and this seems all that can be desired.

From the way in which the Bankruptcy and Insolvency bill is framed, it appears, however, that the Attorney-General has undertaken a campaign for the liberation of imprisoned debtors, and the universal discharge of the indebted; while he concedes the above-mentioned complaints of creditors to be well-founded, and has set himself to the task of providing a remedy. He proposes to do this—1st, by a reorganization of the judicial machinery of the court; and 2nd, by considerable alterations in the law. We have already stated some reasons for objecting to the proposed division of judicial functions between the County Courts and the Court of Bankruptcy, and we will now briefly state in what respects some of the other changes proposed by the bill appear to us likely to create evils greater than those they are intended to remedy.

The Attorney-General, on introducing his bill, referred to the expense of collecting and distributing an estate as the foremost evil of the present system. The expenses of bankruptcy ad-

ministration are, undoubtedly, a most serious grievance, and the smaller the estate the more serious the hardship. These expenses can and ought to be reduced; but it is not to the demands of the official assignee that they are chiefly attributable, though this functionary is to be made the whipping-boy to appease the clamour. But it is worthy only of *Punch* or of Lord Teynham to say, as was gravely said in parliament, that 33 per cent. of a bankrupt's property is swallowed up in the cost of *collection*, and it is of course simply absurd to compare with bankruptcy administration a debt-collecting agency, and inquire why the former should be more expensive. The fact is, that a bankrupt's estate is much more cheaply and effectually *collected* by the court than it could be by any organization of creditors. It is the expense of administration that falls so heavily on the small estates; but this evil is attributable partly to the percentage levied on a bankrupt's estate, in order to provide for outgoings that ought to be borne by the Consolidated Fund, partly to the present scale of professional and official remuneration, and partly to the procedure of the court. Where a bankrupt is charged with any offence against the law of bankruptcy, and the estate is small, a still larger proportion is of course swallowed up in expenses; but while investigations must be made at the expense of the creditors, punishment should be awarded at the expense of the public, as in the case of other offences. The fault lies chiefly in the fees levied, which by a redistribution of burthens might fitly be reduced. By transferring to the Consolidated Fund the compensations and annuities, the Attorney-General achieves a present relief of charge to the extent of £20,000, and proposes to abolish the percentage charge accordingly; but he requires the registration in court of every future trust-deed or deed of management, and gives a registration fee, which he expects to produce a revenue much greater than the amount of the percentage. It is said that there were 8000 assignments to 660 adjudications in the year 1858, and that this resort to private arrangements is attributable to the evils complained of, and the consequent unpopularity of the courts. With regard to the solicitor's costs, let the framer of any new scale of remuneration be warned that the present scale cannot be materially reduced without the danger of lowering

the character of the practitioners. As to the costs of the messengers, it is notorious that these functionaries are absurdly and provokingly overpaid; but this evil can be remedied without abolishing the messengers, as the Attorney-General proposes to do, and might easily be met by requiring the Lord Chancellor to reduce the scale of remuneration. And here, in passing, we must observe that an amusing and a discreditable ignorance as to the real functions of the "messenger" was displayed on the late debate, when he was represented as an incubus on the bankruptcy system, who receives from £1000 to £2000 a-year for going on messages for the court, and hires a man at 3s. 6d. a-day to do the work; whereas the messenger is the constituted officer of the commissioner for the seizure and custody of the estate, and is of necessity a responsible, if not always competent, functionary, and is indispensable if those duties are to be authorized, as they have been for years past, by the commissioner's warrant.¹ The charges of the official assignee form the item next in magnitude, and these will be greatly reduced if the official assignees are to be paid, as the Attorney-General proposes, partly by salary and partly by fees.

As it is proposed to fix the income from both sources at a certain annual limit (in London £1500, and in the country £1200), the scale of remuneration can, of course, be greatly lowered when all cases of insolvency, as well those of traders as those of non-traders, shall come before the same court. The existing system, of which the official assignee is an essential part, was introduced in order to correct the evils arising from the gross mal-administration by the old trade assignees, who sometimes employed the trust estate for their own benefit, were often guilty of jobbing, connived at unfair preferences, hushed up delinquences, and made things pleasant for their friends. The existing system is admitted to have effectually put a stop to these evils (except, of course, as regards those private arrangements and deeds of trust, over which, unfortunately, the court has not had any control); but the cry is, that it costs more than it is worth, and the commercial idea of bankruptcy reform—which, we are sorry to see, the learned Attorney-General adopts in his bill—

¹ He discovers and secures property, sometimes carries on the trade, arrests fugitives, and does what no official assignee can do.

therefore proposes a return to the superintendence of trade or creditors' assignees, not indeed without check or control, or without payment for their services; but the notion evidently is, that more economical administration and larger dividends will be obtained, by the creditors taking on themselves the functions of the official assignee. We shall have something to say presently as to the dangers and mischiefs involved in such a change, and we protest against the folly of sacrificing to an unreasonable clamour the agency of an officer whose functions are of the greatest benefit to creditors and to the interests of justice.

That creditors of a bankrupt should be paying, at this day, the retiring annuities and compensations awarded in consequence of changes made by parliament in the bankrupt laws many years ago, is a great grievance; and we are glad to see that these are to be at length transferred to the Consolidated Fund, the Attorney-General holding out the consoling prospect to the Chancellor of the Exchequer, that these charges cannot long endure, notwithstanding the mysterious connection between a sinecure and longevity. As an equivalent relief to bankrupts' estates, the percentage fees are to be abolished, and the salaries and ordinary expenses of the courts are to be provided for by fees (payable in the form of stamps), on petitions and arrangement deeds, and in these respects we think the bill gives all the relief that can reasonably be asked by creditors.

We now come to the complaint, that the existing law is not effectual for the punishment of offences. The Bankrupt Law Consolidation Act of 1849 contains a category of offences, on proof of any of which the commissioner is to refuse protection, and to refuse or suspend the bankrupt's certificate; but there is no direction as to ordering him to be prosecuted. The commissioner has also a discretionary power of suspending certificate and withholding protection where misconduct, not constituting any of the defined misdemeanours, may be proved. The Attorney-General's bill leaves all offences against the law to be dealt with by the criminal tribunals of the country; but where the bankrupt is charged with any offence, the Court of Bankruptcy will still have to investigate, and, as it were, try the case before

it can suspend the discharge, and order a prosecution. The discovery of offences against the bankrupt law, must of course be made at the expense of creditors during the investigations which take place in the Court of Bankruptcy; but we do not see why the expense of substantiating a charge before the Bankruptcy Court, any more than the expense of a prosecution when ordered by the court, should necessarily fall on the creditors, the public being wronged by an offence against the bankrupt law as by any other misdemeanour. The Attorney-General's bill very properly provides for payment of the costs of a prosecution by the county, as in the case of other prosecutions, and empowers the court to appoint a prosecutor. Sir Fitzroy Kelly proposes to give the new chief judge in bankruptcy power to try by a jury, and examine witnesses on a charge of misdemeanour under the statute; and, moreover, to give the Court of Bankruptcy the double jurisdiction of a court of equity and a court of common law. The power to try questions of fact by a jury, which is proposed by the Attorney-General's bill to be given to the chief judge, is not, it seems, to apply to such charges.

The complaint against the present classification of certificates of conformity is met as Lord Chelmsford and Lord John Russell, by their respective bills in 1859, proposed to meet it, by abolishing the classification altogether. Our readers need not be reminded that the Act of 1842 (passed during the chancellorship of the venerable Lord Lyndhurst), transferred to the commissioner the right previously vested in the creditors, to give a discharge by certificate. It made the grant of certificate a judicial act, and not only took it from the creditors and vested it in the court, but required the court to review the bankrupt's conduct as a trader, and, on finding him guilty of misconduct, to punish him by suspension or even refusal of certificate. The Act of 1849 continued this jurisdiction, and added a category of specific offences which the commissioner was to punish by refusal of protection, and suspension or refusal of certificate. The same Act also introduced the attempt to distinguish the unfortunate from the censurable trader by the classification of certificates. This device was not recommended by the Lords'

Committee or the Commissioners of Inquiry, and is generally supposed to have been inspired, like the category of penal clauses, by the Manchester houses themselves. By the Act of 1849, the certificate is to be granted as of the first class where the bankruptcy is attributable to unavoidable losses and misfortunes; of the second, where not wholly attributable thereto; and of the third, where not attributable to losses and misfortunes. But this arbitrary classification has not produced its desired effect, and the Attorney-General's bill proposes to abolish it. Mr. Howell recently proposed¹ to substitute for the existing Procrustean form of certificate, certain statutable forms conveying the opinion of the court as to the cause of bankruptcy, and this suggestion appears well calculated to meet the object in view; the bill, however, only directs that the cause of suspension shall be certified on the face of the "discharge," which the Attorney-General substitutes for the present certificate of conformity.

The complaint, that creditors have not sufficient control over their debtors' estate, is met by one of the most astounding of the Attorney-General's ingenious transformations; for he proposes that, after the adjudication of bankruptcy, creditors may, if they please, dispense with the services of the official assignee, who is thereupon to change places with the assignee chosen by the creditors. The Attorney-General meets an outcry against the expense of the present system, not by merely reducing it, but by handing over the estate to the creditors, to be administered by themselves, or rather by an accountant—one of "the train of dependent satellites with whom the magnates of the wholesale houses move about the commercial system." Such a change would be a return to the bad system that was abolished by Lord Brougham's Act of 1831, and would be not only retrograde, but mischievous legislation. That system was described by Lord Overstone in the debate last session, as "that old condition of bankruptcy administration under which the funds were imperfectly realized, kept back, or unjustly distributed; under which improper transactions were concealed, chicanery perpetrated, and some of the creditors paid in full in order to buy off unpleasant investiga-

¹ 5 Jurist, N. S., p. 118.

tions." By returning to that old state of things, mercantile fraud would escape exposure; and (as was said in the same debate) such documents as British Bank Reports, and imaginary spelter-warrants, might be freely issued without much fear of consequences. To enable the creditors to conduct the administration of a bankrupt's estate through a trust of their own creating, is, moreover, a gratuitous piece of mischief, as arrangements without bankruptcy, under the control of the court, are, by this bill, much facilitated. The proposed power would certainly be abused where it might be the interest of parties to conceal censurable transactions; and it is suggestive that the dictatorial associations of traders, by whom this proposal is doubtless inspired, make the publicity of bankruptcy investigations one of their complaints against the existing system.

It would be difficult to point out any provision of the bankruptcy law that has worked more beneficially for its objects than the appointment of official assignees, and they have been truly said to form the corner-stone of the new system introduced by Lord Brougham. The Attorney-General, nevertheless, proposes to make the official assignee the mere interim protector of an estate, from the time of the adjudication to that of the first meeting of creditors, and then to divest the property from him, and vest it in the person who may be chosen by the creditors to be sole assignee, if, by their vote, the official assignee shall not be retained. It is a great mistake to treat this as a question affecting only the gains of the official assignees; we have no particular sympathies for that meritorious but very well-paid body of functionaries, and we look at the question only as it regards their public usefulness, and the interests of justice. The reasons for retaining the services of the official assignee, cannot be more forcibly stated than they are by the Royal Commissioners of 1854, in the following words:—

"This officer, chosen for his experience in commercial affairs, and his knowledge of finance and accounts, is employed in the investigation of the bankrupt's books and papers, and of his affairs generally, with the view of securing to the creditors every portion of the estate, and of enabling them to resist unfounded

claims. In the course of these labours he becomes acquainted with the conduct of the bankrupt and the character of the bankruptcy, and is often able to furnish the commissioners with trustworthy information. These are duties which cannot be properly and efficiently discharged except in a fixed office, and they may be advantageously executed in one locality as the centre of an extensive district."

The administration of assets is the proper business of the Court of Bankruptcy; for their collection its officer has powers and is constituted with machinery the most effectual that can be devised; their safe custody is guaranteed by ample securities, and their distribution is placed under the direct control of the court itself. The Attorney-General's plan would substitute for a responsible public officer any touter for office whom the creditors may nominate, would transfer the estate to his possession; and, as the creditors would have more profitable occupation than in looking after him, the administration of the estate would be practically in his hands. As the assignee chosen by the creditors is to be paid for his services, we would like to know where the saving of expense will be? The perverse proposal for the official assignee and the creditors' assignee to change places, and for the official assignee to be paid a yearly salary for keeping the creditors' assignee in check, must surely be modelled on the Japanese system of espionage; but we cannot congratulate the Attorney-General on this result of his perusal of Mr. Oliphant's entertaining volumes. The office of official assignee, at least as far as regards the country districts, will be gradually though indirectly abolished, by enabling creditors to withdraw any estate from administration by the Court, and by the provisions for the transfer of the smaller class of estates to the County Courts. In the face of these provisions there is something cruelly delusive, in providing that the difference between the proposed salary of £600 a-year, and the £1200 to which the country official assignees' income is to be limited, shall be made up by remuneration allowances; the Attorney-General holds out the cup of Tantalus—offering fees while he takes away the business which is to yield them.

The complaint, that the jurisdiction in bankruptcy is not sufficiently localized by the District Courts, we have already stated to be in our opinion unfounded; and, at all events, to furnish no sufficient reason for incurring the evils of dividing the jurisdiction with the County Courts, more particularly because the provision in the bill for the holding of sittings at any place in the district, and the practice of admitting proofs by affidavit, really meet all reasonable demands on this head.

The objection urged against the publicity of the proceedings is met by giving power to the Court to despatch, on summons "at chambers," such business "as can, without detriment to the public advantage, arising from the discussion of questions in open court, be heard in chambers." The Royal Commissioners, in their report in 1854, remark that "publicity is a principle not to be unduly pressed;" and we have always thought that the proof of undisputed debts, and many of the examinations that constitute the administrative business in bankruptcy, need not be taken in open court.

All insolvency, we mean all arrangements between a debtor and his creditors, should be subjected to judicial control, the jurisdiction to be exercised with all possible privacy where there are no circumstances to require disclosure in open court. There can be no reason why arrangements between a debtor and his creditors should not be at once private and under judicial control. While, therefore, the Attorney-General's bill protects compositions, assignments, and private trust-deeds, it attaches to them the novel conditions that the deed must be registered in the Court, that the parties are to stand legally in the same relations as if there had been adjudication, and that examination of the debtor and his accounts may take place. These provisions appear to us to be very salutary, but they are only an extension of existing machinery, applicable to arrangements under control of the Court, which indeed has in some respects an advantage over the deeds contemplated in the learned Attorney-General's clauses, inasmuch as a resolution of creditors on a debtor's "proposal," vests his estate and constitutes a trustee without any deed whatever, and preserves to the creditors the

protection of the Court's control until the full performance of the trust. The Attorney-General points out, as one of the advantages of the new clauses, the saving of the percentage which he says has kept large estates out of the Court; but, as the percentage is payable by the existing law only where the estate vests in the official assignee by resolution of creditors (for the estate does not of necessity vest on a trader's petition for arrangement under control), we do not see the greater advantage of the new clauses in this respect. Besides, it is proposed to abolish the percentage in all cases. If the object of the Attorney-General's clauses in this behalf is to facilitate trusts over which the Court will have no control, we strongly object to them. We are persuaded that no private arrangements are satisfactory to any parties excepting the Solicitor and Accountant. Trust-deeds and deeds of inspection are quite as expensive as bankruptcy, and, under these private arrangements, undue preferences and debts improperly allowed swallow up more than any bankruptcy proceedings. Trusts are chiefly defended on the ground that the prospect of getting through on easy terms, induces a debtor to place himself in the hands of his creditors while he is able to pay a tolerable dividend. But the debtor's proposal being generally a composition accruing due by instalments, he the while resuming his trade, he begins afresh as if a certificated trader, but fettered by that engagement; and if he ultimately fails, it is often found that property of new creditors, who may or may not have been cognizant of the arrangement, has gone in payment of the old debts. It has been urged, with great justice as we think, that every composition deed should give to the debtor a perfect discharge, and to the creditors all that his then estate will pay. The Attorney-General admits that at present a trust-deed gives imperfect relief, affords no power of supervision by the law, and no power of examining the debtor or his accounts; and we agree with Mr. Lawrence, that these deeds afford no adequate protection to the debtor, no real satisfaction to the creditor, and result in an inequitably administered estate, an unreleased debtor, and unsatisfied creditors. We therefore approve of the proposal, that all deeds

relating to arrangements between a debtor and his creditors shall be registered in court, if any deeds of arrangement are still to be allowed; and, so long as the principle of judicial control is duly extended to private arrangements, we see no objection to the exercise of that control with all the privacy consistent with the intent and meaning of the law. We are glad that those provisions of the Act of 1849, which relate to what are called "arrangements by deed," as distinguished from "arrangements under control of the Court," are to be reformed. They have been fruitful of litigation, and their judicial interpretation has afforded to creditors another ground for complaint against the existing law. An assignment agreed to by six-sevenths of a trader's creditors is held¹ to be vitiated by the reservation of any part of his property though the legislature, as Lord Chief Baron Pollock remarked, probably intended to sanction any mode of arrangement by which the creditors would be satisfied without having recourse to bankruptcy.²

From those provisions of the Attorney-General's bill which are intended to remedy defects of the existing law, and to obviate the complaints we have above discussed, we come to the startling proposal for changing the constitution of the Court of Bankruptcy by extending its jurisdiction to non-traders, abolishing the court for the relief of insolvent debtors, and seating in the odour of insolvency in Portugal Street the judge of the "London District Court of Bankruptcy." There certainly appears to be a very general wish among the commercial classes to effect a combination of the two systems, although high authorities are not agreed as to the propriety of such a measure. At a meeting of the National Association in 1858, Lord John Russell remarked on the mischief arising from a multiplicity of courts, and from the administration by different tribunals of laws applicable to the insolvency of traders and laws applicable to the insolvency of persons not in trade; and stated his approval of a

¹ *Cooper v. Thornton*, 1 Ell. and Bl. 544; *Marsh v. Warwick*, 1 H. and N. 158.

² We strongly object to the proposal, that in trust-deeds the concurrence of three-fourths in value of the creditors shall bind the rest: the concurrence of three-fourths in number as well as value should be required.

measure for the fusion of the two systems, and their administration by one tribunal, though headmitted the distinction between the two subjects; observing that the merchant, whose expectations had been frustrated by a sudden fall in the price of silk, or sudden rise in the price of tea, was in a different position from a man of little or no property, who had obtained easy credit, and become embarrassed by extravagance. It has been said that the distinction between bankruptcy and insolvency is irresistibly suggested by common-sense, inasmuch as the non-trader is generally a man of limited or ascertainable income—at all events, a man not liable to the misfortunes incident to mercantile adventure—and ought to adjust his engagements to his means of payment, whereas the trader is, as our old phraseology called him, a venturer; and so complete is the absolving process, that when he has obtained his certificate he goes forth free to trade again. There was another distinction of great social importance, inasmuch as the law did not, until of late years, undertake to administer the estate of a non-trader save on his own petition, whereas the failing trader was made bankrupt by his creditors. The cases in which a trader obtains adjudication of bankruptcy against himself, bear a small proportion to those in which a creditor petitions; and in most of them the hostile proceedings of a creditor intent on the capture of his debtor's person or property, occasion the trader's petition. It has been remarked that if all debtors, whether in or out of trade, are to be made subject to the bankrupt laws as proposed by the Attorney-General's bill, many a country gentleman or professional man, whose property may not be immediately convertible, or whose income is receivable only at fixed periods, might be put at the mercy of a designing or malicious creditor; and we agree that hardship and abuses will result, unless the new powers be guarded by unequivocal tests of insolvency. Still, the distinction between the two classes of debtors, arising from the totally dissimilar causes of the inability to meet their engagements which brings them before the Court, is not, perhaps, a reason for preserving the two systems of judicature that exist. Lord Chelmsford, by his bill, proposed to abolish the distinction, and to make the cession of the property of any

debtor a satisfaction for his debts; in other words, to extend to insolvent non-traders the protection for after-acquired property which is enjoyed by the certificated trader, and the bill of the Attorney-General does the like. He thinks it oppressive that the honest debtor should remain, as the discharged non-trader remains, liable to creditors after his discharge. Still, it may be asked, why the law should relieve a debtor from liability, as well as rescue him from embarrassment and process, save on the ground that he has sustained that embarrassment through unavoidable losses and misfortunes incident to mercantile adventure? There is great moral difference between the contracting of debts by a non-trader without any reasonable prospect of paying them, and the speculations of a trader with the capital or goods intrusted to him for the purpose of carrying on trade; but when the trader's speculations are reckless, or are unwarranted by capital, and he "plays off his counters against other men's money," there is no great moral difference between the two cases. It has therefore been doubted whether a trader, whose failure is attributable to misconduct (not amounting to cause for refusal of certificate), is entitled to be discharged from future liability. At all events, the transfer to the Court of Bankruptcy of jurisdiction over the non-trading debtor, can be no sufficient reason for giving him, for the first time, freedom from future liability, except in consideration of the cession of substantial and divisible assets. Among insolvent non-traders, as well as among insolvent traders, there are, on the other hand, some debtors who may be regarded as innocent victims of misfortune; and we agree with the learned Attorney-General, that it is oppressive to render their future acquired property liable to their debts, more especially when we start the discharged trader again as a free man, though his failure may not have been occasioned by unavoidable losses and misfortunes. The cession of all a debtor's property, the moment he becomes unable to meet the demands of his creditors, ought to be the condition of his discharge from liability, and the discharge should then be unconditional, or at least the condition, if any, should be in favour of *all* the creditors.

But the learned Attorney-General is not content with extending to insolvent debtors not in trade the system of judicature hitherto applicable to traders. Because an insolvent debtor who is not in trade can now be discharged without giving up any property whatever, the bill proposes to abolish the requirement by which a trader, invoking the bankruptcy laws for his protection and discharge, must first satisfy the court that he has available estate sufficient to produce £150 at the least. The bill contains, moreover, some unheard of provisions for enabling an imprisoned debtor, even though he may not have £10 left for the petition stamp, to sue the Court of Bankruptcy *in formâ pauperis*, and obtain his discharge at the expense of the fund raised by the contributions of estates in bankruptcy. We can only describe such provisions as being simply of the most mischievous character, and as holding out encouragement to a debtor to go on until he has nothing left. If the Attorney-General chooses to permit an insolvent debtor to obtain relief by bankruptcy, just as he might now obtain his discharge from the Insolvent Debtor's Court, without having any assets to give up for distribution,¹ this surely can be no reason for placing the creditors of the class of traders now liable to become bankrupts, in a worse position than their present one, by abolishing the requirement which makes the giving up of, at all events, £150 the condition of protection and discharge when sought by the trader debtor himself. A proceeding which is exclusively for the debtor's benefit, and not in any degree for the benefit of creditors, is unquestionably foreign to the proper province of the Court of Bankruptcy; it is a court of administration—a court of liquidation—but not a court for what is familiarly known as white-washing. We are satisfied that, to allow an insolvent debtor, whether trader or non-trader, to invoke the bankruptcy laws without having any estate to give up to his creditors, and to choose his own time for resorting to the court, must be productive of the most mischievous consequences; and the extraordinary provision in favour of pauper prisoners is one that we should think will not be relished

¹ We believe that not three insolvents in a hundred have even £50 for their creditors.

by the trading community, who complain of the charges which already burthen the fund raised by contributions from estates. But an unwise tenderness towards imprisoned debtors seems to have inspired many parts of the Attorney-General's measure, which, although betraying the dictation of the wholesale houses and inspirations derived from Manchester, might be termed "a bill to provide for the universal discharge of debtors, and their release from engagements." We doubt exceedingly whether the bill will really have the effect of lessening expenses to any extent whatever, or of obviating the alleged reluctance of the mercantile classes to resort to the court; if, however, it were possible that the provisions to which we have just now adverted could become law, the bill would, at all events, bring plenty of business to the court, but it would be a flood of insolvency, pauperism, and fraud. If the principle of dividing jurisdiction under this bill, with a tribunal so differently constituted as the County Court, should receive the sanction of the legislature, we do not see why the county courts should not be allowed to retain, as courts auxiliary to the District Courts of Bankruptcy, a jurisdiction to the extent to which the county courts now possess it, under what are known as the Protection Acts, viz., a jurisdiction over traders whose debts do not amount to £300. This is a very different thing to giving the County Court a jurisdiction concurrent with the Court of Bankruptcy, in cases where the assets are not expected to exceed £300. The statistics of the protection cases, in which jurisdiction was for a time exercised by the Court of Bankruptcy, and is now exercised by the county courts, afford some idea of the probable result of abolishing the distinction as to the amount of debts, and the requirement that a trader must show assets to the extent of £150, before he can obtain adjudication against himself. Very few of the petty traders have possessed any estate at the time of petitioning; a dividend has always been a most rare occurrence; and these "Protection Cases" formed a profitless and obstructive class of business when the jurisdiction was exercised by the Courts of Bankruptcy. We observe, that of 3413 petitions of insolvent debtors in one year (1858, we believe), 2183 were presented by

this class of small traders, viz., traders owing less than £300—a class, of course, not affected by the fluctuations and misfortunes which often occasion mercantile failures.

The bill contains provisions which are intended to operate, and will probably operate as tests of insolvency, and as means of bringing a failing debtor's estate under protection of the court, and preventing its dissipation by preferences and executions. The Attorney-General proposes, for example, to limit the present remedies of a judgment creditor at law, but to give additional facilities for examining the debtor as to the state of his affairs; and is stated to accede to the proposal, that power should be given to examine any debtor against whom a creditor to sufficient amount files an affidavit of belief that he is in insolvent circumstances, and calling on him to show cause why he should not be declared bankrupt. Some new acts of bankruptcy are, moreover, proposed to be enacted; but the provision in the bill, that non-payment by the acceptor of a bill within twelve days shall be an act of bankruptcy, is stated to be given up by the learned Attorney-General. It was judiciously recommended some time since, that a trader should be required, on ascertaining his insolvency, to stop payment, and apply for protection, which should be given until a day when, on inquiry by the court after notice to creditors, it should be decided either to prosecute the case as a bankruptcy, or pursue the liquidation in private, as is now done in the case of arrangements under control of the court, and that the debtor should be liable to be imprisoned for not complying with that requirement, in the event of adjudication being obtained by a creditor. The Attorney-General's bill does not adopt this recommendation; but it provides that an interim protection may be obtained either by the debtor or his creditors, and that this recourse to the court shall not of necessity result in bankruptcy. The bill also proposes that a debtor shall be entitled, without committing an act of bankruptcy, to obtain adjudication for the purpose of protecting his estate pending the decision of his creditors on the proposal he is to submit for arrangement. But the protection to person and property, which a trader who has assets worth £200 may now obtain, on petition for an

“arrangement under control of the court,” without committing an act of bankruptcy, seems to meet the object of these new provisions without the inconvenient machinery of an adjudication; and it has the advantage of giving the court control over the performance of the arrangement, supposing the debtor’s proposal to be assented to and approved; whereas by the Attorney-General’s bill the creditors may, in all cases after adjudication, remove the liquidation into their own hands.

While the bill abridges the right of the creditor to detain his debtor in execution, it provides that, after imprisonment for fourteen days, instead of the twenty-one days now required, a debtor who does not himself petition may be adjudged bankrupt whether he will or no; so that, although the Attorney-General does not meddle with the vexed question of abolishing imprisonment for debt, he greatly abridges that pernicious luxury.

We have now adverted to the principal provisions of the bill, with regard to the constitution and jurisdiction of the court, and the persons liable to it; but some point arises on almost every clause of this formidable bill, and we might point out many matters of detail which require careful attention; into these, however, it would be tedious to enter in the present article. It will be seen, from the foregoing remarks, that her Majesty’s Attorney-General professes to raise a new structure out of the old materials, after clearing the ground which he finds incumbered with the remains of former alterations, but he will not leave of marble the structure that he found of brick. If his present attempt be unsuccessful, and bankruptcy reform be again delayed, let him remember that St. Louis, when defeated in a crusade, was the first to exclaim, that the disappointment was no more than the shortcomings of himself and his subjects had justly incurred.

[NOTE.—While we do not wish it to be understood that our views accord with those of the writer of the above paper in *all* the various matters he has touched upon, yet we are glad to lay before our readers what we think in the main are valuable and useful observations.

The vice of this Bankruptcy bill belongs to the system of legislation, which permits measures of the greatest importance, requiring

prolonged and critical examination by the classes interested, to be launched in parliament in a descriptive and felicitous speech, instead of being laid as a preliminary step before the public for careful consideration. If a bill, deliberately framed on well-recognised principles, submitted to discussion and correction, and with the advantage of the suggestion and experience of practical men, had been introduced to the House of Commons, there would have been some chance of passing a good measure on insolvency years ago. At present, no one has any confidence in the accurate drawing or the fair working of the bill of the present session. We ask if a bill, involving such interests as does this, *ought* to have been so prepared as to admit of Sir R. Bethell using such language as the following, which we extract from his speech (*vide Times*, March 18):—"I trust the bill will receive a searching investigation in committee, *when I shall look for very great improvement on the measure.*" We do not say the bill ought not to be improved; but we *do* say it will be very strange if it be improved in committee.

The Law Amendment Society appointed a committee to examine Sir R. Bethell's Bankruptcy bill, and they, having first considered the constitution of the court and the administration of the business of the court, as well as examined the provisions of the bill relating to persons subject to bankrupt laws, acts of bankruptcy, and proceedings before and after adjudication, have submitted the following resolutions as the results of their inquiries:—

"That in abolishing the distinction between trader and non-trader, and rendering all debtors liable to the same laws, provision should be made that the order of discharge should in all cases have such conditions annexed to it as the justice of the case may require.

"That the acts of bankruptcy contained in existing statutes, and omitted from the bill, should be retained, and that greater facilities should be given to creditors for obtaining adjudication than is proposed by the bill.

"That clauses 153 and 158, which propose to give greater facilities for obtaining adjudication, are objectionable; and that clauses 160 to 175, inclusive, are unnecessarily obstructive to creditors, and require amendment.

"That clause 177, as it now stands, will defeat the application of the penal and other clauses, in the case where the debtor petitions against himself, as in such case adjudication is not made necessary, although other clauses assume its existence.

"That by the 221st, 222nd, and other clauses, there is an undue multiplication of notices; and that provisions with regard to notices, accounts, &c., should be the subjects of general orders, and not of legislative enactment."

It was also stated at a meeting, that the bill in general met the views of the mercantile community, and that the Attorney-General was most willing to modify it, so far as he could consistently do so, to make it square as much as possible with the view of traders. It was also resolved, as the opinion of the Society, that the court should consist of a chief

judge and three assistant judges, one of whom should sit in Portugal Street; that the assistant judges should determine all questions, administrative and judicial, and that the chief judge, with one or more of the assistant judges, should constitute a court of appeal for both London and country causes; that "it is inexpedient to intrust the administrative business of the court to the registrars, who should be reduced to three (two for Basinghall Street and one for Portugal Street), and receive, as at present, £1000 per annum each; that the court should be retained in Basinghall Street; that three messengers should be retained, distributed in the same way as the registrars, but the scale, as well as the amount of their remuneration, should be lessened." Various other suggestions were made of more or less importance.—*Ed. L. M. & R.*]

ART. XII—JURISDICTION AND PROCEDURE OF COURTS OF LAW AND EQUITY.

1. *The Third Report of the Common Law Commissioners*, 1860.
2. *Lord Campbell's Law and Equity Bill*, 1860.
3. *Observations on the Law and Equity Bill*. By the Master of the ROLLS and VICE-CHANCELLORS, presented to the House of Lords 23d March, 1860.

WE have two "Reports" before us—one is the Third Report by the late Commissioners "appointed to inquire into the procedure and system of pleading in the superior courts of law at Westminster;" the other is by the Master of the Rolls and the Vice-Chancellors on the Law and Equity bill, the four Equity judges having virtually been appointed a commission of critics, *pro re natâ* to examine, and it would seem to overrule, the conclusions of the Common Law Commission. The latter body comprised a selection of the most able jurists of the day, whose good fortune it has been to devise what is recognised as one of the most successful and important reforms in the practical working of the jurisprudence of a great nation. Their final and crowning work is embodied in their Third Report, and the Bill founded thereon, now "wambling" in the House of Lords; and it is at this juncture that an extemporized committee of Jur

Equity judges has been called into being, and instructed to report, after a few days' notice, upon the new measure, and, if it please them, to neutralize the results of the nine years' labour and research of the Common Law Commission. If the co-operation of the four Equity judges had been necessary, in order to determine on the propriety of the provisions of the new Common Law Procedure Bill, which is really only the natural and logical sequence of the two Procedure Acts of 1852 and 1854, these gentlemen ought to have been added to the number of the commissioners. This has not been the plan followed. The commission has investigated the whole subject scientifically and practically; and having laid down, in its several admirable reports, the principles on which the jurisdiction and procedure of the courts of law should be based, proposes, in the bill of the present session, to give effect to the reforms already commenced, and thus render the legal system complete and effective; whereupon certain judges of the Court of Equity, who have not previously had the subject in hand, are called on to deliver themselves, in what is called popularly "a promiscuous" fashion, of their opinions generally on the whole subject; and it seems that they do not agree with the Common Law Commissioners, but object to the proposed alteration. We shall presently lay before our readers the two Reports, and they will, we believe, agree with us, that while the one emanating from the Common Law Commission is philosophical and logical, expressing in apt language the principles of procedure, that of the four Equity judges is weak and crude, and contains only a perverted statement of the provisions of the Law and Equity bill, and a weak reiteration of ancient prejudices against alteration in the law. The Equity judges, it will be seen, wish to postpone any alteration in "our tribunals until a careful *revision* has been *made of our whole law*." What this proposed "revision" ought to be is not indicated. Lord Justice Knight Bruce once asked from the Bench whether a short Act had not lately been passed repealing the whole common and statutory law "of the United Kingdom." Perhaps this is the "revision" we are to wait for. We really

feel at a loss how to criticize this four judges' report without undertaking to expound the elementary principles of procedure, and reproducing the demonstrations now familiar to English jurists; or without a tedious recapitulation of arguments which, we had presumed, had long since done their work. It will, perhaps, be the better course to proceed in order, and lay before the reader so much of the Third Report of the Common Law Commission as bears upon the more important position of the questions under discussion.

Chancery Jurisdiction.

We proceed to the second part of the subject, namely, the powers hitherto exercised by Courts of Equity alone, which we have proposed should be conferred upon Courts of Common Law. The experience of the five years which have elapsed since the passing of the Act of 1854, has strongly confirmed the views which we sought to enforce in our last Report; and we cannot but regret the partial manner in which our recommendations were carried into effect by the Legislature. Upon this subject, in addition to what we formerly urged, we beg to submit for consideration the following observations:—

Besides the exclusive jurisdiction which the Court of Chancery has from time to time acquired over subjects which either never were within the scope of the Common Law, or have ceased to be so from desuetude or express enactment, that Court has also exercised in various instances powers over subjects within the jurisdiction of the Common Law Courts, either in aid of those Courts, as by discovery, or by way of prevention of a threatened injury, as by injunction against a wrong, or against an apprehended unjust litigation, or by way of specific performance, or by way of restraint of the proceedings of the Common Law Courts, where the prosecution of actions, and even the execution of judgments, have been stayed by injunction, upon the ground that there was something in the proceedings contrary to the law administered in the Court of Chancery, technically called Equity. We desire to call attention to the points in which the two jurisdictions at present thus interfere, and are dependent one upon the other.

With that part of the Chancery jurisdiction which deals with subjects not within the cognizance of the Common Law Courts, it is no part of our duty to deal, because it does not interfere with the jurisdiction or procedure of the Common Law Courts as at present constituted. It is with that part of the Chancery jurisdiction which undertakes to aid the proceedings of Common Law Courts, or to furnish a better remedy, or to control and restrain their proceedings, that we are concerned, because, in our opinion, the relation of the courts to one another is, in respect of such jurisdiction, anomalous and absurd.

Discovery.

The auxiliary power of the Court of Chancery to compel discovery, in aid of an action or defence in a Common Law Court, has already, by the Common Law Procedure Act of 1854, been conferred upon the Courts of Common Law. No practical difficulty has been experienced in the exercise of this jurisdiction. In cases where discovery must previously have been sought in the Court of Chancery, it has, since the Act of 1854, been speedily obtained at Judges' Chambers at a comparatively trifling expense.

Injunction against threatened injuries.

That part of the jurisdiction of the Court of Chancery which relates to protection against threatened and impending injury, deals to a great extent with subjects which are within the general jurisdiction of the Courts of Common Law. It is founded upon the principle of giving a more complete remedy by restraining the commission of injuries, in respect of which the Courts of Common Law can only award damages. We proceed to consider this subject, with reference to the various remedies in their order.

First, as to the power of restraining, by injunction, threatened and impending injuries. Upon this subject we have already, in our second report, stated at large the opinion of the former Common Law Commissioners, and our own. Suffice it now to say, that, for the reasons there stated, Courts of Common Law ought equally to have power to protect legal rights from violation, and to give damages for actual injury. It often happens that both compensation in damages and protection are required in order to afford justice; and in such cases, where immediate protection is necessary, no complete remedy can at present be obtained, except by resorting to the Court of Chancery. This arises from the circumstance that there is no provision for issuing an injunction from a Common Law Court in case of threatened injury. It is necessary, as the law at present stands, to wait until a wrongful act has actually been commenced, so that an action for damages may be maintained, before application can be made for an injunction to a Court of Common Law, whereas the danger of such an injury is enough to found the jurisdiction of the Court of Chancery. This seems unreasonable, when it is considered that the right threatened to be violated exists at the Common Law; and that, in case of actual injury, redress is given in a Common Law Court, and not in the Court of Chancery (unless it be incidentally under the Act 21 & 22 Vict. c. 27), and that after the wrong has actually commenced, an injunction may be obtained in a Common Law Court against its repetition or continuance, or the committal of an injury of a like kind; and yet that, in case of threatened and impending injury to a similar right, it is necessary to resort to the Court of Chancery. This defect in the jurisdiction of the Common Law Courts, which is the more striking when it is considered that the Court of Chancery often declines to interfere until after the right has been established at law, ought, we think, at once to be remedied. The reasons for doing so are shortly

as follows:—The rights, in respect of which the remedy proposed is to be given, are recognised in Courts of Common Law, which are instituted for the purpose of protecting and vindicating them. The complete enjoyment of such rights can only be obtained through the means of injunction, by which the violation of them is prohibited and prevented. Damages in many cases afford but imperfect redress; in practice, the resort for protection by injunction to a court different from that in which the right, if in dispute, is and ordinarily must be tried and established, necessitates two suits instead of one: lastly, to give the power to the Common Law Courts in all cases of common law rights will be to restore an ancient jurisdiction in an improved and more efficient form.

The procedure for this purpose may be at once simple and effective; namely, by application to the court or a judge for an injunction. If the case be such that the recovery of damages would be an inadequate or inconvenient remedy, the injunction may be ordered to issue forthwith *ex parte*, subject of course to an application by the opposite party to dissolve it. It should be in the discretion of the court or judge, whether the injunction should issue in the first instance, or whether only a rule or summons to show cause should be granted.

Upon motion to quash the injunction, or on the hearing of the rule or summons to issue it, the court or judge ought to have power either to decide the matter summarily, or to direct an action, or issue, or a special case, and to impose such terms as to keeping an account or otherwise, and to make such order as to the costs of the proceedings, as may be just.

This power ought to be conferred in all cases of Common Law rights in which an injunction might be obtained in the Court of Chancery.

In an action involving the question of injunction, brought or continued under the direction of the Court or a Judge, it should not be necessary to claim an injunction in the declaration, unless directed by the Judge; and in such an action not so brought, the party injured ought to be at liberty, as at present, to claim an injunction if he think proper. The provisions of the 82nd section of the Common Law Procedure Act of 1854 ought to be modified, so as to be applicable to the new writ.

Injunctions to protect property.

The power of issuing injunctions by the Common Law Courts is at present confined to actions in which some breach of contract or duty is complained of, and cannot be exercised for the protection of property, the right to which is in litigation. It cannot, for instance, be exercised in the action of ejectment, even to prevent irreparable waste; nor in case of detainee, to prevent the defendant from making away with the goods which may be specifically recovered. This defect in the jurisdiction should be supplied by extending the power of issuing injunctions, so as to prevent injury to or the making away with property, in actions in which the title thereto is in dispute.

Delivery up of documents.

Another measure of protection at present afforded by the Court of

Chancery, consists in ordering the delivering up of documents, which, upon the face of them, appear sufficient to give the holder a right of action at Common Law, but which, by reason of circumstances which might be set up as a defence if an action were brought, ought not to be made available. In such a case, the danger that by lapse of time evidence of the defence may be lost, and so the instrument may be unjustly enforced, is considered as constituting a right in the party apparently charged by the instrument, unless disabled by some act of his own, to have it given up and cancelled, and so to have the claim set at rest. This power may well be given to the Courts of Common Law, in respect of Common Law claims and defences. And in cases in which only a part of the amount appearing to be due on the instrument is in fact due, an offer to pay such part, and a payment of the amount into court to abide such order as the court may make, ought to be considered equivalent to actual payment before proceedings. This may be done either by action or by summary application to the court, as may be thought most advisable.

Interpleader.

Under the same head of protection against anticipated injury may be classed the proceedings in Interpleader, which we now proceed to consider.

The principle of Interpleader is this: That a person having, without any fault on his part, the possession of property in which he claims no interest, and which is claimed by two or more adverse parties whose alleged titles have a common origin, is entitled to be protected from the necessity of litigating the question of property in which he has no concern, upon giving up the subject-matter in dispute to be dealt with under the direction of the Court, which then determines the question in a proceeding between the adverse claimants. Before the statute 1 and 2 Will. IV., c. 58, the remedy existed in the Common Law Courts in one form of proceeding only, namely, the action of detinue. One of the last instances, if not the last, in which it was resorted to was in the case of *Land v. Lord North*, 4th Douglass, 266. The statute referred to, however, gave jurisdiction to the Common Law Courts, in cases of action brought by one of the claimants against the holder of the property. It also gave a new power to relieve Sheriffs against the necessity of litigating adverse claims made to goods taken under an execution. In this latter case, the Court of Chancery before the statute declined to exercise jurisdiction, for the alleged reason that, if the Sheriff had made a wrongful seizure, he ought not to be relieved, while, if he had made a rightful one, there was no occasion for interfering; and it may be doubted whether that court will assume jurisdiction since the statute (see *Tufting v. Harding*, Dec. 21, 1859, before Vice-Chancellor Kindersley). The jurisdiction conferred upon the Common Law Courts in such cases has proved highly beneficial. In some particulars, however, it requires extension and amendment.

With respect to both kinds of interpleader proceedings, difficulties have arisen where the claim is at present capable of being enforced in the Court of Chancery only, and is called equitable. In respect to

such claims, Courts of Common Law have at present no jurisdiction, and the consequence has been that great inconvenience has arisen in the execution of the Interpleader Act. To enable the courts to do complete justice in such cases, their jurisdiction ought to be extended to all claims, whether legal or equitable, where an action has been brought in respect of a Common Law claim within the former branch of the statute, or there has been a seizure in execution within the latter. In case of interpleader for relief of sheriffs, jurisdiction ought to be given to the Common Law Courts, even though the claim or claims be all equitable. The proceedings upon such a claim may be in the same form as those in the case of a conditional defence upon equitable grounds, which will be mentioned in a subsequent part of this report.

In interpleader after action brought by one of the claimants, an amendment is also advisable. The course of decision upon the construction of this branch of the statute has usually followed that of the decisions in Chancery, which, amongst other exceptions to this jurisdiction, appear to have established that relief will not be given when the titles of the claimants have not a common origin, but are adverse to and independent of one another. This exception, of which the alleged reason is not very obvious, has no place in interpleader proceedings for the relief of sheriffs; and we see no good reason for its existence in any case of Interpleader in the Common Law Courts. To take the common case of a wharfinger or warehouseman seeking relief against adverse claimants, the applicant has, generally speaking, no information as to the nature of their alleged titles, and yet it is clearly just, that, whatever that may be, he ought not to be at the expense and risk of determining who is in the right in a contest in which he has no interest whatsoever, except it be to hand over the property in dispute to the rightful owner. We recommend that interpleader should be allowed to all persons not falling within the class at present estopped from interpleading, whether the adverse claims have a common origin or not.

Interpleader for the relief of sheriffs admits of further improvement. It often happens that where a sheriff has seized goods in execution, a claim is made to them under a bill of sale to secure an amount much less than the value of the goods, and the goods, if sold, would be sufficient to satisfy both the execution and the bill of sale creditor. In such cases great difficulty arises. The property of the goods is entirely out of the debtor, and in the bill of sale creditor. The former has a right to the goods upon paying off the bill of sale, and that right ought to be available to the execution creditor. The bill of sale creditor has a right to the possession of the goods for the purpose only of satisfying his debt, and he ought not, provided his own debt is first satisfied, to be allowed to stand in the way of the execution creditor by objecting to a sale by the sheriff. There are other similar cases in which the claimant is entitled to the goods only to secure a debt. The judge ought to have power in all cases where the right of the claimant is only by way of security for a debt, to direct a sale, and the application of the proceeds, in case of a surplus,

to satisfy the execution, upon such terms as to payment of the secured debt or not, and otherwise, as the judge may think fit.

The jurisdiction in interpleader cases ought also to be extended in the following particular. It occasionally happens that the execution creditor and the claimant agree to leave the matter to the decision of the judge before whom the summons is heard, without requiring an issue. When points of law only are involved, this course saves expense and delay. Even where questions of fact are involved, now that the parties and their witnesses can be summoned and examined before the judge, it not unfrequently happens that the judge, by consent, disposes of the case. Sometimes, however, even in cases of small amount, one of the parties insists upon the trial of an issue, at a greater expense to both parties than the amount in dispute. In cases of this kind, it is obviously for the advantage of all that the judge should have the power of deciding summarily, and so preventing needless expense. We think this power should be given to the judge, to be exercised if he thinks proper.

We would further recommend that in all cases where the question is one of law, the facts not being disputed, the judge should be at liberty to decide the question without an issue, and, if necessary, to direct a special case for the opinion of the court.

The Report then proceeds to the question of giving to the courts of law the power to enforce *specific performance*. The Commissioners reiterate their opinion already expressed in their *Second Report*, and which it would have been well to have regarded six years ago. Surely in all cases when a breach of contract can be redressed by an action for damages in common law courts, a power of decreeing specific performance ought to be given them.

With regard to *defences on equitable grounds*, given by the statute of 1854, we have always felt that the Common Law judges timorously allowed themselves to narrow the force of the provision, the language of which unfortunately admitted of that more limited construction which they adopted.

Notwithstanding recent legislation—says the Report—the law is still imperfect in not admitting, by way of defence to a Common Law action, matter which is now ground only for application to the Court of Chancery to restrain the proceedings by injunction.

In all actions at Common Law, whatever is ground for a perpetual injunction, ought to be and is received as a defence, where the relief in Chancery would be unconditional; and in cases where such relief in the Court of Chancery would be conditional, the courts of Common Law ought to have power to give, in a summary way, the same relief against actions pending therein. The first part of this recommenda-

tion has obtained the force of law by the 83rd and following sections of the Common Law Procedure Act of 1854, but subject to a condition, namely, "provided that such a plea shall begin with the words, *for defence on equitable grounds*, or words to the like effect." Considerable difference of opinion exists amongst us as to the propriety of requiring that a plea should be thus headed, but as we are not agreed upon this matter, we do not think it expedient to enter further upon it.

"The second part of the recommendation now under reconsideration has not been acted upon, and the consequence has been, that in many cases pleas founded upon matter which would, in the Court of Chancery, be ground for conditional relief, have necessarily been rejected by the Common Law Courts, although they involved no difficulty which could not have been readily overcome by their ordinary procedure. The consequence is, that in such cases the defendant must either resort to the Court of Chancery, or submit to the judgment of the Court of Law, though he is ready and willing to perform the conditions upon which, according to the rule of the Court of Chancery, he ought to be relieved from the effect of such judgment.

Difficulties have been apprehended in raising such defences, because of the rigidity of the existing forms of pleading and judgment in the Courts of Common Law, and from its having been supposed that no appeal could be made to lie against a decision founded upon a summary application. In truth, however, no such difficulty exists. An instance of a conditional equitable defence given effect to by the proceedings in a Common Law Court, is presented by the proceedings in an action upon a mortgage to stay the action, and for a reconveyance upon payment of the debt and costs. The power of giving relief upon summary application, by rule or summons, may be coupled with a right to the unsuccessful party to appeal, by leave of the court, within a limited time upon giving security. The appeal might be in the form of a special case, stating the facts necessary to raise the question, as in appeals upon new trial motions under the Common Law Procedure Act of 1854. This power of appeal, coupled with a discretionary power to direct issues or inquiries, and as to costs of the action and application, will enable the Common Law Courts, in the great majority of cases, to dispose of such defences finally; whilst, in cases in which any unforeseen difficulty may arise, though we do not anticipate any, a provision, similar to the 86th section of the Common Law Procedure Act of 1854, will enable the court or judge to "reject the defence, in case it cannot be dealt with by a court of law so as to do justice between the parties, upon such terms, as to costs and otherwise, as to such court or judge may seem reasonable."

In these cases the summons or rule would be in the nature of a bill for relief; if a form of procedure analogous to a plea is preferred, there is no reason why it should not be adopted. In that case the judgment must be altered, and be made the same as the combined effect of a Common Law Judgment, and a decree on a bill for relief from it. On such a Judgment, Error or Appeal may lie as on other Judgments.

The remainder of the Report cannot be alienated, and we accordingly transfer it bodily to our pages.

Ejectment.

The Action of Ejectment is not included in our recommendations under this head, because the course of legislation on the subject of land has tended to maintain and strengthen the distinction between legal and equitable estates, and we cannot hope, under the form of an improvement in procedure, to change the system thus sanctioned.

Relief against Forfeitures.

There is, however, in addition to the case mentioned in our Second Report of an outstanding trust term, a class of cases in which we think the Courts of Common Law might, with advantage, be authorized to receive defences, at present available only by proceedings in Chancery ; we mean cases of relief against forfeitures.

It often happens that contracts provide for a pecuniary penalty of large amount, in case of non-payment of a smaller sum, or non-performance of one or more stipulated acts, the omission of which occasions damage of less amount than the penalty. In such cases, at the Common Law, it was formerly competent for the stipulating party, in case of breach of the contract, to demand and recover the whole amount of the penalty, without regard to the actual amount of damage sustained. In the Court of Chancery, however, unless it appeared that the amount represented the agreed damages for a breach of contract, technically called "liquidated damages," the sum stipulated to be paid was considered merely a security for the actual damages sustained ; and where these admitted of calculation, that court relieved against the penalty upon compensation being made for such damage. This jurisdiction has been given to Courts of Common Law, and the conflict between the two courts put an end to, by the statutes 4th Anne, c. 16, s. 11, and 8th & 9th W. III., c. 11, s. 8. No more than the actual damage sustained can now be recovered, and the interference of the Court of Chancery is no longer necessary.

Upon the same footing stands the jurisdiction of the Court of Chancery to relieve against forfeiture of leases for non-payment of rent, and in certain cases, since the statute of 22nd & 23rd Victoria, c. 35, against breaches of covenants to insure.

This jurisdiction has, in the case of non-payment of rent, been partially conferred upon Courts of Common Law by statutes 4th Geo. II., c. 28, ss. 2, 3, 4, and the Common Law Procedure Act, 1852, ss. 210, 211, 212. We think that the jurisdiction of the Courts of Common Law should be extended in this direction, and that, in every case of ejectment brought for a forfeiture, these courts should have, upon rule or summons, power to relieve in all cases in which relief can now be obtained by bill in Chancery.

The legislation upon this subject will thus be rendered consistent.

Complete Jurisdiction in first Court.

Another enactment is, however, necessary to give full effect to the reception of such defences by Courts of Common Law. It is that a defendant shall not be permitted to proceed in the Court of Chancery for relief, which he may obtain by plea or otherwise in the court in which the action is pending; unless after such defence has been rejected by the Court of Common Law expressly upon the ground that "it cannot be dealt with there so as to do justice between the parties." The course of decision upon this subject may be traced in the cases of *Prothero v. Phelps*, before the Lords Justices, 22nd December, 1855; *Wild v. Hillas*, before Vice-Chancellor Kindersley, 3rd December, 1858; *Kingsford v. Swinford*, before the same Judge, 31st January, 1859; and *Gompertz v. Pooley*, before the same Judge, 9th February, 1859. These cases seem to establish that in the present state of the law it is competent for a defendant, after allowing the action to proceed to its termination without availing himself of such a defence, to file a bill in Chancery founded upon the same matter, and after a second investigation of the case, to nullify the judgment. This may be prevented without introducing any novelty in principle, simply by requiring the defendant, upon the first opportunity, to put forward all that he intends to rely upon in answer to the action.

Bill for a New Trial.

The alleged jurisdiction of the Court of Chancery to entertain bills, technically called Bills for a New Trial, to restrain execution upon a verdict and judgment, after the time for moving for a new trial in the Common Law Courts has elapsed, ought also to be abolished, as tending to revive and continue a litigation already brought to a close in a court of competent jurisdiction. Courts of law have abundant authority to deal with cases of fraud upon the Court, and abuse of their proceedings. In other cases it is considered that the time allowed to prepare for trial, and to move for a new trial, gives the defeated litigant as much opportunity to bring forward the matter upon which he relies, as is consistent with a speedy and efficient administration of justice. The protraction of litigation to a length bearing a large proportion to the ordinary period of life, is all but equivalent to a denial of redress, and it operates with almost equal disadvantage to both the litigants. The cases in which such a jurisdiction may be applicable were always rare, and they have become more unlikely than ever to occur, since the parties to a suit may be examined for or against themselves. Bills for a new trial have, for the reasons stated, fallen into disrepute and disuse; but as the jurisdiction is stated to exist, and is an anomaly in our jurisprudence, we think it ought to be abolished by express enactment.

We have thus recommended that many powers exercised by the Court of Chancery should be given to the Common Law Courts, and in doing so we have selected those only which seemed to us likely to be exercised there with advantage. It has not been our object to extend, for the mere sake of extending, the field in which the courts

have common jurisdiction, by giving to the Common Law Courts powers which may be exercised with equal benefit in the Court of Chancery ; but simply to prevent the necessity for a resort, by either party, to both courts for the purpose of obtaining complete justice, where the Court of Chancery at present, in the case of Common Law rights, gives, on the one hand, aid by way of discovery, or a more complete remedy, as by injunction and specific performance, or, on the other hand, restrains the proceedings in Common Law Courts because of the existence of an equitable defence. Indeed, it is obvious that our recommendations, instead of having a tendency to extend the common field of jurisdiction, suggest a contrary and more effectual mode of putting an end to the contest between Courts of Common Law and Chancery, by so distributing their jurisdiction as to render their interference with one another impossible. It is our intention and wish that the result of what is proposed should be ingrafted upon and become part of the Common Law, and that the distinction between Common Law and Chancery Law should be so far abolished. If, in addition to this, the Court of Chancery is prohibited from interfering in cases where Common Law rights are thus rendered capable of complete vindication in the Courts of Common Law, and in which, therefore, its interference will have become useless, the greater part, if not the whole, of the field of conflict will be done away with, by confining the operation of the courts respectively to subject-matters peculiar to each. Thoroughly to affect this it is necessary to confer upon Common Law Courts power to give, in respect of rights there recognized, all the protection and redress which at present can be obtained in any jurisdiction, and it is upon this principle that we have acted in our suggestions. If they be carried into effect, there will no longer be the spectacle of jurisdictions imperfect in themselves and clashing with one another ; but each court will be armed in itself with exclusive jurisdiction over the subject-matter within its cognizance, and with full power to give all the protection and redress which the law at present affords by means of a plurality of suits : The conflict of jurisdiction will be done away with, because the occasion for it will no longer exist.

We have only to add, that we have given our best attention to the question, whether it is necessary to adopt the procedure of the Court of Chancery in cases where it is proposed to borrow from its remedies ; and we have arrived at the conclusion, strengthened by an experience of the working of the Common Law Procedure Act of 1854, that the desired object can be attained as effectually, and with less expense, by means of the ordinary proceedings of the Common Law Courts.

We have thus finished our task ; and we submit this, our Final Report, to Your Majesty's royal consideration.

A. E. COCKBURN. (L.S.)
 SAMUEL MARTIN. (L.S.)
 JAS. S. WILLES. (L.S.)
 G. BRAMWELL. (L.S.)
 W. H. WALTON. (L.S.)

Next, let us see what are the "observations" of the Equity Judges on the "Law and Equity Bill:"¹—

The intention of the framers of this bill would appear to have been the prevention of delay and expense, by rendering the court, in which litigation of any kind may be commenced, competent to the determination of all questions whose solution is necessary in order that complete justice may be done between the litigants.

So far as this can be "satisfactorily" done, to use the language of the preamble, no one would question the expediency of legislation; but it appears to us that the principle upon which it is attempted in the bill is essentially erroneous.

The bill may be divided into two principal heads:

It commences by conferring on persons apprehensive of an injury, which would be the subject of redress in a court of law, the power of originating proceedings in a court of law to prevent the injury. It subsequently enables a plaintiff who insists on a legal title to compel his adversary to submit his defence, which may be merely equitable, to the decision of a court of law, and deprives the defendant of all power of having recourse to a Court of Equity.

The result is this:—A plaintiff is to be allowed in each class of cases to have the choice of his court; and any one having a legal title to property, but subject to equitable claims, may, by taking the initiative as plaintiff in a court of law, withdraw the equitable claims, the only real question probably in dispute, from the consideration of the courts which have hitherto been accustomed to take cognizance of them.

No solid reason can be given for either course of action. As long as the distinction exists between legal and equitable interests, so long will two different courses of procedure be required, whether such procedure be exercised by one court (as formerly, on two sides of the Court of Exchequer) or by separate courts, as in the Courts of Common Law and the Courts of Equity; and the only "satisfactory" mode of doing complete justice, will be by employing the apt procedure in each case, according to the nature of the rights in question between the parties. The bill leaves it to the choice of the plaintiff to determine whether his antagonist shall have this advantage or not.

The twelfth clause of the bill recognises the probable existence, indeed, of cases in which a Court of Common Law cannot do justice; but the thirtieth clause renders it impossible for the defendant to seek aid elsewhere, unless the Court of Common Law shall have become convinced of such its incapacity.

The true principle, as it appears to us, on which a bill for enabling a Court of Common Law to do complete justice between the litigants, without regard to the distinction between legal and equitable rights, should proceed, would be this:—Remodel the court of law, give it all the officers proper to the adjustment of equitable questions, reconstruct

¹ The Bill is very ably drawn, in conformity with the above Report of the Commissioners.

its procedure where equitable rights may intervene, or, in other words, reconstitute such a court as the equity side of the Court of Exchequer, which was recently abolished with the general approbation of the profession. But to enact that a Court of Common Law, either with its existing incomplete machinery, or with some imperfect additions to its powers, falling far short of those vested in Courts of Equity, shall either on the one hand abandon the case, owing to its incompetency, after great expense and delay on the part of all concerned, or shall proceed, and compel the defendant to submit himself to the procedure of the imperfectly constituted court, seems to us calculated to create confusion, from the probably conflicting decisions of courts of law and equity on the same class of questions, injustice to the defendant whose rights are subjected, without his consent, to the operation of an imperfectly constituted tribunal, and in the greater number of cases to double vexation after much useless delay and expense.

The mode of appeal provided by the bill is a further instance of the mischief that may arise to suitors. The appeal is to be to a Court of Error—a very competent tribunal for determining the points of law which remain when a jury has solved the questions of fact, but rigid in the extreme in its rules of procedure, and utterly incompetent to dispose of the mixed questions of fact and law that continually arise on appeals from Courts of Equity,

We would beg to suggest a few instances only, in which the bill may work great injustice. A vendor has let a purchaser into possession on a parol agreement. The purchaser may have effected extensive improvements. The vendor, apprehensive of a bill for specific performance, brings ejectment, with no object but that of bringing the defendant before a court of law, instead of a court of equity. A fraudulent trustee brings ejectment against his *cestui que* trust. An equitable mortgage has been created by deposit of deeds; the mortgagor brings detainee for the deeds. In all these cases, we ask, why is the plaintiff to be at liberty to change the jurisdictions? There is really no question of law between him and the defendant; the whole dispute is on the equitable right.

Courts of Equity determine the rights of every person interested in the question raised once for all; but for this purpose necessarily convene all persons interested. Questions as to parties are often questions of considerable nicety. The court of law cannot, under this bill, summon any parties other than the litigants in the action. It may, however, determine that no other party is necessary, and the defendant will have to submit to that conclusion; but on a bill filed by any of the absent parties, a Court of Equity may come to a contrary conclusion, and the defendant may have to abide a decision the reverse of that which he had to submit to at law.

We see no adequate provision for the protection of infants, whose trustees may have subjected themselves to the operation of the thirtieth clause, and be thus precluded from asserting the rights of the infant in equity.

It is reasonable that, where both parties consent, any matters, either legal or equitable, should be determined by one court. It is quite

reasonable, also, that no slight incidental equities on collateral points should impede the decision of the court of law ; but, in practice, we conceive the constitution of the courts of law and their ordinary course of procedure point with sufficient clearness to the extent of jurisdiction which can be conveniently conferred on them for this purpose. Whenever a case can be brought to a single issue of law or fact between the parties, whether the issue depend on legal or equitable title, the court of law can satisfactorily determine it. The existing statutes have, as it seems to us, provided an adequate remedy by allowing equitable pleas ; and where such pleas have failed, the reason of such failure has been the want of adequate machinery to work out the determination of the right. The tenth clause attempts to extend the jurisdiction, and some attempt is made to extend the machinery ; but nothing short of a complete conversion of the court into a court of equity can secure the result aimed at, viz., satisfactory decision ; and the twelfth clause will be found ultimately to render the bill a dead letter.

We do not wish to be understood as recommending a reconstruction of the courts of law on the model of the old Court of Exchequer. We think no attempt should be made to alter our tribunals until a careful revision has been made of our whole law.

JOHN ROMILLY, M.R.
RICHARD T. KINDERSLEY, V.C.
JOHN STUART, V.C.
W. P. WOOD, V.C.

22nd March, 1860.

Now these observations of the Judges in Equity are directed, partly against the main principle, which asserts that every court ought to have power delegated to it for the adequate and final determination of all questions submitted to its arbitrament ; and partly against the practicability of carrying such principle out as proposed.

But the principle contended for has been already established by the Legislature in the statute of 1854 ; and though it seems now self-evident that this is the true principle, we owe the effective assertion of it to the same Commissioners who, by their Law and Equity Bill, now purpose to carry out, consistently and thoroughly, the object which the second Procedure Act only partially secured. Accordingly the Commissioners, by the "Law and Equity Bill, 1860," purpose to provide courts of law with powers quite adequate to decide on issues brought before them. The united wisdom of the four Equity Judges replies—How can

courts of law do this, for they *have* not the means and machinery? No court, it would seem, but one with the *name* of Equity attached to it, can possess this mysterious "*machinery*." The united wisdom demonstrates one of two things, either that the Commissioners' bill is a most imperfect, innovating, rash, foolish, and inadequate measure; or, that the powers imparted by it are too great, because competent to enable them to do the work hitherto performed by Courts of Equity. They argue, in other words, that courts of law ought not to undertake certain legal duties until they are competent; but it having been proposed to render them competent, they object, at least, until "our whole law" is "revised." A "complete conversion" of courts of law into courts of equity, moreover, they say, is essential; which, whatever they mean by it, they do not condescend to render clear to the minds either of the august persons they address, or, we should think, to any other minds.

So weak are the general objections of the four Equity Judges, and so infelicitous the particular illustrations they select, that we fear to meet and refute them lest we should be deemed disrespectful. It is impossible to suppose that such men are infected with a feeling of paltry jealousy, and apprehension of the business and importance of Equity Courts being threatened, by such a measure as this bill. We decline, however, the difficult task of seeking further for the explanation of the "Observations on the Law and Equity Bill."

But will the effete, short paper of dogmata be allowed to have weight with the Legislature? Will this unfortunate appeal by the House of Lords to men who, it would seem, from habit of mind, or haste, or some other cause, have been incapable of taking a philosophical and scientific view of procedure, produce the result of quashing the measure? If so, all we will now say is, that the Bill is more unfortunate in its nominal parliamentary supporters than it is in its opponents. Our readers will know what the fate of the Bill is to be as soon as we do; and it is therefore of no use speculating here on the subject.

In addition to those portions of the Third Report of the Com-

mon Law Commission which we have above extracted, there are a few paragraphs containing suggestions of a useful description, which we have only space to enumerate:—the first is, as to *joinder of parties* in their causes, when the right to sue arises in such a manner that it is doubtful in whom it is vested. Here it is recommended, that plaintiffs may be entrusted with the right to bring their actions in the name of all the persons in whom the legal right may be supposed to exist, leaving it to the Court to give judgment in favour of the persons they find entitled. This is a valuable suggestion, provision being duly made for questions affecting costs and set off.

Further, it is recommended that the provisions of 19 & 20 Vict., c. 108 (s. 63, 68), should by enactment be extended to *all* cases of *Replevies*; that the plaintiff in answer to an accessory ought to be able to pay money into court; and that the defendant in actions on bond and in detinue, ought (by leave of the court or judge) to have the like privilege.

Passing over the suggested amendments in the clauses of the statute of 1854, relating to *attachment of debts*, which will doubtless prove beneficial, we come to the proposal that the statutes relating to *costs* should be revised and consolidated, and indeed it is high time they were so treated. The commissioners further reiterate the recommendation to mix special jurymen with the common jury, and so try to improve the average wisdom of the dozen arbiters of men's fortunes. The special juries are still to be paid, it would seem. If so, we would ask why should not the common jurymen also receive *adequate fees*? If a jury is worth having, it is worth paying for; and a fee of £5 for the luxury of a common jury, might make suitors or their attorneys think occasionally whether it would not be worth while to dispense with their services, and try the causes before a judge, who is in a majority of cases more fit to decide issues. It will be monstrous to hand a guinea to each of three gentlemen, and a few pence only to the tradesmen. A useless tax is often imposed upon the time of jurymen, and the best mode of awakening the minds of people to the fact that they are not in all cases necessary, any more than they are

advantageous, would be to attach a certain fee to be levied except when therein ordered.

We now await the determination of the legislature upon the measures. We have no doubt but that ultimately a measure like that of the Law and Equity Bill¹ must be enacted. If the Government be well advised, it will pass this session; if timid and submissive to the improvised committee of the four Equity Judges, it will only be postponed until the profession and public, taking notice of the measure itself, and the character of the opposition to it, insist upon its becoming the law of the land.

ART. XIII.—JOHN AUSTIN.

THIS is one of the greatest names in the history of jurisprudence; and, in some respects, there is none that stands above it. It becomes our duty to mention a few particulars of his life; his memory will be best preserved by his works.

John Austin was born 3rd March, 1790, and died in December, 1859. At the age of sixteen he went into the army, and passed several months with his regiment in Sicily. His friends, however, observing that ardent love of knowledge which through life so remarkably distinguished him, and having a high opinion of his talents, strongly advised him to quit the military profession for one better suited both to his tastes and his capacity.² Accordingly, on coming home, he applied himself to the law with a zeal, and a firm, close attention, that struck his fellow-students as well as his instructors; and was called to the bar in 1814.

His fellow-students, and the eminent lawyers under whom he studied, had marked with wonder the force and clearness of his mind, his retentive memory, and the peculiar vigour and scholar-like appropriateness, as well as the extreme precision of his lan-

¹ If passed this session, it will be entitled the "Common Law Procedure Act, 1860." On 24th April it passed the second reading in the House of Lords, and was then referred to a select committee.

² He himself always held in high esteem the character of the true soldier.

guage. They confidently foretold for him the highest place in the profession. In 1819, after an attachment of five years, he married Miss Sarah Taylor of Norwich, one of the most eminent of that family, so much respected and so greatly distinguished for their talents, and so gratefully regarded by the community for the exercise of those talents in promoting sound opinions for the benefit of mankind. The highest prospects of professional success were unhappily clouded by the failure of his health, which it soon appeared must make exertion at the bar impossible, and he was compelled to relinquish it. The failure of his health alone caused this determination; and, after the long and laborious studies by which he had made himself a profound master of the law, as well in its details as in its principles, we may well believe that it was a severe mortification which he underwent.

Fortunately, at this time, the foundation of the London University occasioned the opening of a school of jurisprudence, and Mr. Austin was by common consent chosen to fill the chair. There could not have been a happier selection, nor could any thing more suited to his great learning and abilities have been pointed out. The only question was, whether his health would stand the labour which his anxiety to discharge the duties, and his zeal for the subject so deeply interesting to him, was certain to make him impose upon himself. He at once gave an earnest of this anxiety and zeal, by resolving to spend the interval between his appointment and the commencement of his lectures in Germany, where the study of the science could be pursued with the greatest advantage in the society of the most eminent Roman jurists. He repaired to Bonn, accompanied by his wife and only daughter, and remained there about six months, which he devoted to the study; and fortunately he then enjoyed better health, at least a greater respite from illness, than at any other period of his life, so that he always looked back to it with the greatest satisfaction.

The pursuit in which he was now engaged, that of teaching his favourite science, was better suited to his talents and disposition than the contentions of the bar, requiring a quickness and

readiness more easily acquired by superficial abilities; while his sensitive, fastidious, and scrupulous nature, severe towards others, but far more towards himself, stood in the way of succeeding in ordinary business. But for a teacher his qualifications were most eminent; profound learning, great reach and force of mind, and a wonderful faculty of exposition. He commenced his lectures under the most favourable circumstances. Among his pupils were many young men on the threshold of public life, and distinguished by their talents even more than by their station, of whom it may suffice to name—the present Master of the Rolls, Lord Clarendon, Mr. C. P. Villiers, Sir G. C. Lewis, and Lord Belper. His lectures were admired by all, but mostly by those whose knowledge and sagacity made their approval of greatest value; and every thing seemed to promise a continuance of the success with which his labours began, and which conferred upon the college a reputation in this department even beyond expectation. But, in spite of the brilliant commencement of his career as a professor, it soon became evident that this country would not afford such a succession of students of jurisprudence as would suffice to maintain a chair; and as there was no other provision for the teachers than the students' fees, it followed of necessity that no man could continue to hold that office unless he had either a private fortune, or combined some gainful occupation with his professorship. Mr. Austin, who had no fortune, and who regarded the study and exposition of his science as more than sufficient to occupy his whole life, and who knew that it could never be in demand among that immense majority of law students who regard their profession only as a means of making money, found himself under the necessity of resigning his chair. Moreover, his health gave way under the insatiable demands which he made upon himself, in striving after a degree of excellence unattainable in those who have to keep pace with the current of human affairs. He bestowed, indeed, on every thing an amount of labour hard to be appreciated, even by those who were most entirely satisfied with the result, which never satisfied himself. He never deemed that he had done any thing

unless he had reached the highest perfection he could attain, and his over-elaboration often defeated itself; but his own conscience must, at all expense of labour, and all risk of failure, be satisfied. His own conscience, his own judgment, were his most severe tribunal. For public opinion he had little respect; indeed, on his own subject he knew it to deserve none. For the good opinion of a few competent judges he was very anxious, but it was by his own standard of excellence that he tried all he did. "How pure, how lofty his ideas, how entirely unbiassed by self-love, vanity, ambition, or any of the passions that blind men to themselves, no words can express." We cite the words of one who knew him well, and they are no exaggeration. But one bad effect of his over-scrupulousness was the dreadful drain it occasioned of his strength, causing his illness to return at short intervals, which, of itself, would have interfered with his professional career. In 1833, he was appointed a member of the Criminal Law Commission, and entered upon the duties of it with his characteristic earnestness and devotion to the great interests of truth, and the welfare of mankind. But it soon appeared to his colleagues that his views were too abstract and scientific, they desiring to prepare a more practical report. Further, he differed from his colleagues as to the mode in which they were attempting to perform their duties; and the opinion, indeed, of Mr. Austin has been justified by the event. It is deeply to be regretted that an arrangement should not have been made for his forming a complete map of the whole field of criminal law. He was of all men most capable of doing this. The commission might then have filled up the details, or, at any rate, made a separate report of the points, to which the general map might be given as an introduction, or as an appendix. He was, however, aware that public opinion, or, if it may so be said, public ignorance must be consulted; and, with his wonted disinterestedness and punctilious reluctance to continue in an office of considerable emolument, when he found himself unable to discharge its duties according to his own estimate of them, he resigned his place, and retired during some time to Boulogne for the benefit of his health.

In 1837, at the suggestion of his friend, Sir J. Stephen, then under-secretary for the colonial department, he was appointed to inquire officially into the grievances of the Maltese, which had for some time been strongly urged upon the attention of the government. He went out, accompanied by Mr. (now Sir George) Lewis, who was appointed second commissioner, and of whom he had a very high opinion ever since he made his acquaintance as his pupil. That he went into the inquiry with all his characteristic ardour for truth, justice, and humanity, need hardly be stated. His name is held in the most affectionate and reverential remembrance by the Maltese. Sir J. Stephen used to say, that the reform of the tariff which he proposed, and which the government accepted, was the most successful piece of legislation he had seen in his time. Mr. Lewis having returned to England, Mr. Austin was about to enter on the more difficult subject of legal and judicial reform, when he was abruptly recalled. He had been appointed when Lord Glenelg was colonial secretary, whose removal was as abrupt as Mr. Austin's, and whose successor probably thought that the termination of the commission was the most acceptable report he could give of it to the House of Commons.

His health had not been improved by his residence at Malta, and in 1840 he went, accompanied by his wife, to Carlsbad, the waters of which proved of material service, and he returned thither four successive seasons. The intermediate winters of 1842 and 1843 he passed at Dresden and Berlin, where he enjoyed the intimacy of Mr. Savigny, the great jurist, for whom he had always felt the highest admiration.

In 1844 he determined to reside in Paris, and continued there until driven away by the revolution four years after. It was a tribute justly due to his learning and talents, that the Institute elected him, on the first vacancy which occurred, corresponding member of the moral and political class.

The last ten years of his life were passed at his cottage at Weybridge in Surrey, in his accustomed occupations of study, and of as much literary work as his very uncertain health would allow. No one can be so well fitted by intimate knowledge of his

character and feelings, and by the affection of a life devoted to him, and, since his irreparable loss, devoted to his memory, as Mrs. Austin, to execute the duty of preparing for publication such portions of his invaluable writings as were left by him in a finished or nearly finished state. One part only of his lectures has been published; it was given to the world in 1832, under the title of "*The Province of Jurisprudence Determined*," and has ever been the subject of unbounded admiration. Some notion of the esteem in which it is held may be gathered from this, that, as he always refused to allow a republication, a copy can now with difficulty be obtained, and as much as seven or eight guineas have been given for one.

We have noted the great qualities and acquirements of this virtuous and accomplished man. In his moral excellence was most especially to be marked that entire abnegation of self, which makes the performance of duty a ruling motive, and to which every personal consideration is sacrificed. The pursuit of truth was ever his first object; the diffusing a knowledge of it his next. Any one who should have suggested that one course of conduct tended more than another to his exaltation, would have spoken a language as unintelligible as that of Central Africa. Of his mental faculties it remains to note one that was very remarkable; his sure though quick perception of resemblances and differences—resemblances between things apparently different, differences between things apparently alike—which ordinary persons are unable to perceive, but admit as incontestable the instant the suggestion is made. Combined with boldness in rejecting received views, and with imagination, this is one of the main constituents of genius.

We cannot close this brief and imperfect sketch without adverting to the description sometimes given of Mr. Austin as a disciple of Bentham's. If this is meant to express his profound admiration of that great man, and his belief in his works being the fruitful source of Law Reform, it is most true. But he was never one of Mr. Bentham's blind worshippers or servile flatterers. On certain points he respectfully but firmly differed from him, and especially on the supposed fitness of the people for the

exercise of political power. He always thought that Bentham's secluded habits, and his acute sense of the misgovernment occasioned by what he called sinister interests, blinded him to the no less dangerous evils arising from ignorance, and events subsequent to Mr. Bentham's death tended greatly to confirm his view.

JUDGES' CHAMBERS.

IN an article (vol. vi. p. 248) which has attracted much notice, and in the views expressed in which we have with us the whole profession, we drew attention to the growth and present position of the practice at Judges' Chambers; and shewed that it urgently required and readily admitted of improvement. But it is one of those matters which, being a little off the high-road, is not easily made a subject of general remark or popular outcry, and so has escaped reform.

Because barristers and attorneys undergo directly, and the public endure indirectly, serious inconvenience every day, they submit to it as a matter of course. Because it exists, few raise their voice against the defects with which it is surrounded. Having been originally (though no one knows, by the way, what is its origin) a sort of private domestic institution, where the judge was good enough to let himself be spoken to, and to give directions in suits, a familiar, irregular, "promiscuous" mode of carrying on the transaction at chambers is perpetuated. The judge is sometimes badgered and pestered with trifling detail brought before him in a manner any thing but respectful; although some judges, it is true, insist upon greater decency than others. Sometimes there are scenes of scrambling occurring among the crowd of practitioners (for whose accommodation there is no arrangement made), not inferior to Sadler's Wells, or St. Paul's on a Sunday afternoon. Nor when the common business has been concluded, and counsel's list begins, is there much ground for satisfaction. Counsel have been kept outside in a dirty anteroom, which on a long day is overfilled; and, when slipped successively or in batches into the august presence of the judge, who has been worried and wearied for some hours, it not unfrequently happens that it is found impossible to obtain the time necessary for the proper settling of the question at issue. In the rapid conversations which ensue upon attempting to compromise or settle the differences of the litigant, we have occasionally heard learned friends pleading, replying, rejoining, rebutting, and arguing in a very irregular manner, while the judge was deciding and making an order. In fact, too much is attempted to be compressed into a limited time, and imposed upon one man.

The judges are full worked, and it is not the least harassing part of their duty to transact business at chambers. They should be relieved at once of the mass of common order business. There

can be no reason why judges should be obliged to leave important labours—abandoning trials at *Nisi Prius* when only half heard, and listening to part of arguments—and betake himself to make orders on points technical and discretional, which any good practical lawyer, with technical knowledge and professional experience, would attend to just as well as the best Chief Justice and most learned Chief Baron of Westminster.

Further, we contend that in the more difficult duties belonging to chamber practice, and when the subject-matter requires the assistance and learning of counsel and pleader, the present system does not work well. It lacks, first of all, certainty in practice. Different judges have different views upon various questions which arise at chambers, and different modes of treating them. One allows what another will refuse—nay, one allows at one time what he himself refuses at another, according as circumstances are or are not favourable to his forming a fair judgment.

It has been suggested—and we wish the Common Law Commissioners had lent the sanction of their opinion to the suggestion—that there should be two officers appointed, whose sole duty should be to conduct the business of judges' chambers. There are men in the profession of large experience, who would perform the duty of chamber judge as well as any judge under existing circumstances can hope to perform it. Such an officer would have a consistent system at work, and he could allot sufficient time for the business in hand. There are men at the bar, and below it, who are eminently fitted for such an office; men of first-rate practical ability, who have had judges for their pupils, and upon whom the most successful and eminent lawyers of the day look as the best practical authorities in the Temple—to whom every one is ready to appeal for law; but who, nevertheless, do not obtain, and indeed do not seek, the higher preferments belonging to the bar. The appointment of such men to such an office, with proper powers of appeal, would be a most valuable and important Reform.

ARBITRATIONS.

WE are aware that our recent remarks on the above subject have excited some observations among lawyers, and we therefore make the present opportunity for returning to the subject.

We have said, and here repeat, that it is obvious to the greatest bigot and constitutional pedant, that trial by jury is not suited to a multitude of causes which are litigated; and when this turns out to be so in any particular case, and it is accordingly referred,

great abuses generally arise. So soon as the reference begins, the costs grow in frightful proportion. Instead of an unfee'd judge, there is the arbitrator, with his three guineas each sitting, which may be abbreviated and adjourned according to the convenience or conscience of the presiding referee. Each counsel also claims for each sitting his fee of three guineas at least. The solicitors must also be paid for their additional labour. Delays and irregularities occur again and again, and are excused. Things are made pleasant to all engaged at the cost of the client; or irregularities are committed by reason of the absence of the control which public opinion exercises in open court. After an inquiry more or less satisfactory, and more or less prolonged, the award is made, and one of the suitors has to pay.

On the Home Circuit, during a recent trial, the outrageous expenses of references were justly made the subject of comment, but no remedy was proposed. We asserted formerly, and we now reiterate our opinion, that the fees exacted by those engaged in arbitrations ought to be reformed. Counsel are retained to conduct their client's cause; and if it is removed for the convenience of all parties to another tribunal, the fees marked on the briefs ought to be deemed the main part of the fees payable. The present mode of payment is a direct premium on prolonged delay of the suit, and opens the door to suspicion of jobbing.

There are two considerations to which we now more particularly advert. The first is, to the impropriety of *bringing* cases not suited to a jury before that tribunal, instead of before a judge alone. Oftentimes arbitration would be unnecessary if the first section of the second Common Law Procedure Act was adopted. The second objectionable practice is that of referring cases wholesale to *Masters* of the court, on the ground that they are "matters of account." This, in a multitude of cases, is a course rife with mischief. Matters of account often turn out to be matters of credibility; and involve as much the balancing of evidence as a running-down case or an issue of fraud.

Though the Masters as a body are highly efficient, they are not appointed on account of their capacity as referees. They have, moreover, abundance of office-work, and the frequent adjournments of references in consequence of their heavy duties, are utterly inconsistent with the satisfactory determination of matters which include disputes of an extensive and varied character. It does not pay solicitors in good practice to attend these references, nor do they, as a general rule, advance the business so well or rapidly as counsel. But it is difficult to make arrangements for counsel to be ready to attend *frequent short sittings* before the Master.

We hear continual complaints of Judges passing off causes to the Masters, who, with every disposition to determine them satis-

factorily, fail egregiously when matters of law and of evidence arise in these supposed "mere matters of account." But the Masters are thus overburdened because the profession insist upon a false system of fees in references made to members of the Bar, and have been shortsighted in their greediness.

POINTS RECENTLY DECIDED UNDER LORD ST. LEONARDS' "LAW OF PROPERTY AND TRUSTEES' RELIEF ACT."

IN our last Number, in treating of this Act we mentioned the cases¹ which, up to that time, had been decided under it, and in which the questions were, whether sec. 32 (relative to investments by trustees) authorized an investment in the New Indian Loan, and whether the section was retrospective. The following cases and decisions on this and other sections of the Act have been reported during the past quarter.

Stuart V.C. in *re* Fromow's estate (8 W. R., 272), held that he was bound by the decision in the case of the Colne Valley Railway, and refused an application, made under sec. 30,² to allow an investment to be made in the New Indian Stock, although all the parties beneficially interested, except one (who was absent in Australia), were willing to consent. We think it is obvious that the V.C. was wrong in not disposing of the matter on its own merits. If every case which arises under sec. 30 be decided according to *precedent*, there will gradually grow up, as is observed by Mr. Vaizey in his recent edition of the Act (p. 105), "a law of administration formed from reported decisions," a consequence certainly not contemplated by the Act, nor in any way desirable. In the case of the Colne Valley Railway it was held, that it was not *expedient* for the trustees in that case to invest in the New Indian Stock, but it was not held to be *unlawful* for a trustee so to invest the trust monies. On the contrary, the Lord Chancellor was clearly of opinion that the investment in question was authorized by the Act. Such then being the case, how was Stuart V.C. bound by the decision?

The next case to which we have to refer, arose on the construction of sec. 27. That section provides for the indemnity, in certain cases, of an executor against the rent and covenants to which his testator may have been liable under a lease.

¹ *In re* The Colne Valley Railway, and *in re* Miles' Trusts.

² This is the section which authorizes the application to the court by a trustee, for the opinion, advice, &c., of the judge, as to the management &c., of the trust estate.

Kindersley V.C., in *Dodson v. Sammel* (8 W. R. 252), held that the section does not apply to leases in existence at the time of the passing of the Act, because the legislature could not have meant to deprive parties of existing rights—if it had, it would have been easy to introduce words to that effect. Thus, then, this section has been passed for the benefit of posterity, although it is not easy to see why the legislature should be supposed to neglect the present generation, and to care alone for posterity, who, as Sir Boyle Roche remarked, have done nothing for us.

In *Page v. Bennett* (8 W. R. 339), Stuart V.C., notwithstanding the decision in the last-mentioned case, held that sec. 4, which gives the court power to relieve against a breach of a covenant to insure, applies to covenants in leases granted *before* the passing of the Act. Surely one or other of these decisions must be wrong; for there is nothing whatever in the wording of sec. 4 to warrant the decision of Stuart V.C., if that of Kindersley V.C. be correct.

Mr. Vaizey, in the edition to which we have already referred, observes (p. 25) that the Court, before the passing of the Act, had *power* to relieve against breaches of covenant to insure, although it did not choose to exercise that power; Stuart V.C., however, did not grant relief on the authority inherent in the Court, but under its statutory power; and it may well be argued (on the authority of the decision of V.C. Kindersley) that, at the time when the lease was granted, the lessor relied on his right, never interfered with by a Court of Equity, to eject the lessee upon breach of this particular covenant, and that it could not have been the intention of the legislature to interfere with this existing right.

In determining questions as to whether the different sections of the Act are retrospective or not, it would seem to be reasonable that the general tenor of the statute should be considered. We find that where sections are not intended to extend to deeds or wills executed before the passing of the Act, the wording of those sections is distinct upon the point. Thus sec. 12 applies to the execution of powers under deeds "*hereafter* executed;" sec. 14, to the raising of money by devisees in trust under wills, "*which shall come into operation after the passing of this Act,*" &c. &c. Apparently this view was entertained by Stuart V.C. (in *Page v. Bennett*), who said that the argument that the court had no power to grant relief for breaches of covenant which have occurred after the Act, under leases granted before the Act, because the covenants were entered into before the passing of the Act, was *wholly inconsistent* with the language of the Act, and with its scope and object.

But if this be so, then the argument that sec. 27 does not apply to leases granted before the Act, because otherwise it

would interfere with existing rights, is likewise not within the language, scope, or object of the Act.

We would not be understood here to question the propriety of Vice-Chancellor Kindersley's decision in the particular case before him, in which a fund had several years ago been set apart by special agreement as an indemnity against rent and covenants; but the Vice-Chancellor was distinct on the point, that sec. 27 does not apply *in any case* to a lease granted before the passing of the Act; and it is the questionable correctness of this general dictum only that we refer to in the foregoing remarks.

With regard to costs under sec. 4, Stuart V.C., in *Page v. Bennett*, decided that the lessor's costs at law in the action of ejectment must be paid by the party seeking relief in equity; but, inasmuch as the lessor's defence in equity had been vexatious, and the section empowers the court to impose terms, each party must pay his own costs in equity.

In re —, a lunatic (not so found, however, by inquisition), 8 W. R. 333, a married woman (the lunatic) was entitled for her separate use to the income of certain trust funds. There were four children of the marriage, and the husband, who was a school-master, was possessed only of income (independently of his calling) amounting to £20 per annum. An application by the trustees was made under sec. 30 to the Lords Justices in the first instance, at the request of one of the Vice-Chancellors, who considered the case of a peculiar nature, for the direction of the court, whether the wife's income might be paid to the husband. The Lords Justices ordered that the income should be paid to the husband until the further order of the court, he undertaking to apply the same for the maintenance and support of the wife and children. The costs of the application were ordered to be paid out of the income.

On points of practice the following decisions have been given—

In *Page v. Bennett* (the case already alluded to, and reported as to the present point, 8 W. R. 300), the original bill did not allege that active measures had been taken by the lessor against the party seeking relief for forfeiture in respect of the covenant to insure. The lessor demurred on the ground that the bill did not bring the case as against him within the meaning of the Act, and the demurrer was allowed with costs, with liberty to amend within a week; but this was part of the vexatious defence alluded to by the V.C. when the case was subsequently disposed of.

In re Muggerridge's Trust (1 Joh. 625, 8 W. R. 234,) two points of practice arose under sec. 30. Wood V.C. held—1st, That the petition should contain in itself every thing necessary for

the court to form its opinion upon, and that no affidavits by way of explanation were admissible; and 2nd, That the petition should not be served upon any one in the first instance, but the trustee should apply at chambers for a direction as to the persons upon whom it should be served.

And lastly, in the case of Mockett's will (1 Joh. 629; 8 W. R. 235), an application was made under sec. 30 for the direction of the judge upon a point which Wood V.C. said was one of great nicety, and on which there were conflicting decisions in the books; and inasmuch as his decision would only give an indemnity to the trustees, and would be subject to no appeal, he thought he ought not to express his opinion unless every party wished it. As it appeared that some of the parties were infants, the advice of the Vice-Chancellor was that a short bill should be filed.

Notices of New Books.

[*.* It should be understood that the notices of new works forwarded to us for review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance seem to require it.]

A Treatise on the Law of Partnership, including its application to Joint-Stock and other Companies ; by Nathaniel Lindley, Esq., Barrister-at-Law. In 2 vols. London : Maxwell, 1860.

MR. LINDLEY'S work has been for some time, and with considerable interest, expected by the legal profession. No one, however, could have blamed the learned and laborious author of the two volumes before us, if he had delayed their publication even to a later date, on the ground of the transitional state of a part of the law, and the importance of the topics of which he has treated. The statutory part of the law relating to public companies has been, and is in an exceedingly unsatisfactory condition ; and whether the pending bill relating to Joint-Stock Companies will survive parliamentary manipulation, and then be worth preserving, is very doubtful. But even if it should pass, the value of that part of Mr. Lindley's book will not be in any way deteriorated, if the account of the bill before the House, which we have elsewhere expressed in the present Number of our Magazine, be correct.

The other very important portion of Mr. Lindley's book is that relating to private partnerships, upon which we may here remark that a good work on this subject was notoriously wanted.

We have not had time so to examine the entire works as to report upon it in the detail which it deserves ; but we have consulted and tested it on various points, and have invariably found it not only correct, but remarkably distinct and clear in its language and arrangement. The index and table of cases, moreover, are excellent. We shall return on the first practicable occasion to these volumes, especially as they promise to be the standard treatise on partnerships, private and public.

Lectures, Elementary and Familiar, on English Law. By James Francillon, Esq., County Court Judge (1st Series). London : Butterworths, 1860.

MR. FRANCILLON announces in his introduction that his object in publishing these Lectures, is to render assistance to young professional students, and to initiate in the study of the law others of the English youth who, as magistrates and good citizens, ought to be acquainted with the laws of their country. The subjects are happily selected by the author, and no little interest is thrown into their treatment ; yet one thing he lacketh, which militates against him—i.e., style. His

lectures are elementary, and unfortunately "*familiar*." We fear that the "familiarity" of these discourses will tend unjustly to produce that emotion which the copy-book proverb affiliates upon it. There was no necessity whatever for adopting this manner, and the author has evidently forgotten the stuff which law students are made of. Let the author only imagine what would be the effect on a pupil-room if this passage on accommodation bills was read aloud:—"The use of accommodation bills is one of the vices of the present time. Little traders are apt to be guilty of this imprudence, but also it is known that some men of high rank are prone to it, *say, members of the learned professions*. What is more to the purpose, I tell you that, when I was in practice, circumstances led me to know that the practice of signing accommodation bills prevailed to a serious extent among mere students."

We would suggest to Mr. Francillon, that in the future series, which will embrace subjects of equal interest to those he has already dealt with in the volume before us, he should render his manner worthy of the matter, and so present an excellent elementary work for students, or the upper classes of good schools.

A Treatise on Maritime Law, including the Law of Shipping, Marine Insurance, and the Law and Practice of Admiralty; by Theophilus Parsons, LL.D., Dane professor of Law in Harvard University; author of Treatises on Law of Contracts, &c., &c. In 2 vols. Boston: Little, Brown, & Co., 1859.

We can here only acknowledge the receipt of Mr. Parsons' work on Shipping, Insurance, and Admiralty. It promises, we think, to prove an important legal treatise, but we received it too late this quarter to enable us to give it that minute attention which we hope it merits, and which we intend to address to it hereafter.

Memoirs of Theophilus Parsons, Chief Justice of the Supreme Judicial Court of Massachusetts; by his son, Theophilus Parsons. Boston: Tickner & Field. London: Trübner & Co., 1859.

We purpose to take an early opportunity of reviewing some of the biographies of American lawyers which have recently appeared. We therefore at present refrain from doing more than mention that judge Parsons lived in the eventful period comprised between 1750 and 1813; and this volume, compiled by his son, contains many interesting illustrations both of the state of society and of the law during the period.

Lord St. Leonards' Act to further Amend the Law of Property and to Relieve Trustees (22 and 23 Vict., c. 35). With Notes. By John Savill Vaizey, Esq., of the Middle Temple, Barrister-at-Law. London: Wildy & Sons, 1860.

THERE is, perhaps, no statute in the whole of the statute book which has been so well "edited" as this Act of Lord St. Leonards. In our last Number, we took occasion to remark upon the excellence of Mr.

Hunter's edition of the Act. We have now before us another edition, which is also evidently the work of a man who has completely mastered the subjects of which he treats, and who is able to convey his knowledge in intelligible language to others.

Mr. Vaizey acknowledges in his preface the advantage which he derived from his predecessors in the same field of labour, and he tells us that the previous publication of editions made him hesitate in his purpose of offering his own observations to the profession; "but," proceeds Mr. Vaizey, "since there appeared to be some points of importance relating to the Act which had not been mentioned by my predecessors—as doubtless any other mind occupying itself with the statute, would discern subjects for remark which have escaped my notice—I resolved to print the results of my investigations." We rejoice that Mr. Vaizey came to that resolution, for he has produced a useful and original work. The disquisitions subjoined to the various sections give a clear view of the law as it stood before the passing of the Act, and of the amendments intended to be effected. We say *intended* to be effected, for there are many sections which do not effect all that was intended; and Mr. Vaizey, as well as Mr. Hunter, has displayed considerable ingenuity in "picking holes" in this statute, which, it must be regretted, was not subjected to the criticism of such able commentators *before* it passed into law.

AMONGST the books received we may enumerate, 1. Mr. Bigg's useful "Collection of the Public General Acts for the *Regulation of Railways*" (1838-1859), which has reached the eighth edition. It would have been of additional advantage if there were references given to the *pages* in the index.

2. The Standing Orders of the Lords and Commons relative to Private Bills, with Appendix containing Table of Fees, &c., also edited by Mr. Bigg. And thirdly, by the same author, a specimen volume of the proposed complete edition of existing public statutes. Mr. Bigg gives in his "explanatory preface" an account of his scheme for providing the public with a compendious edition of the statutory law. The objections allowed by Mr. Bigg to have been made to his proposals when laid before the government, that they were submitted by a person who is *not a barrister*, is too absurd to be tenable. If Mr. Bigg can accomplish what he professes to be able to accomplish, it can be of no possible importance what his calling may be.

A Selection of Leading Cases on Mercantile and Maritime Law; by Owen Davies Tudor, of Middle Temple, Esq. London: Maxwell, 1860.

THE above is another of Mr. Tudor's volumes of leading cases, which must necessarily stand over for further notice. An elaborate volume like this, of 900 pages, evidently does not admit of our doing justice to it in the interval between its publication and the date of our present Number.

Memoirs, Letters, and Speeches of Andrew Ashley Cooper, first Earl of Shaftesbury, Lord Chancellor; with other Papers, illustrating his Life. Edited by William Dougal Christie, Esq., Minister Plenipotentiary in Brazil. London: John Murray, 1859.

THE above work is, as the title indicates, and the preface confesses, not a biography of Lord Shaftesbury, but only a collection of parts of the material to be used by one who shall hereafter write the life of this eminent man. Mr. Christie explains the circumstances which have prevented him from writing such a life, and we can only hope that either he or some other competent person may undertake to give, in a completed form, the history of a man who has not hitherto had justice done to his memory.

We are led to expect the publication of papers relating to the later parts of the life of Lord Shaftesbury, and which will embrace that more immediately interesting to lawyers. We shall hope therefore to recur to this subject hereafter. We will only commend to any reader who may be anxious to see, how Lord Campbell *does* "Lives," to peruse Mr. Christie's "Critical Examination of the First Chapter of Lord Campbell's Life of Shaftesbury."

Tracts, Mathematical and Physical. By Henry Lord Brougham, LL.D., F.R.S.; Member of the National Institute of France; Royal Academy of Naples; Chancellor of the University of Edinburgh. London and Glasgow: Richard Griffin & Co., 1860.

THESE tracts, written at different times between 1796 and 1858, are inscribed to the University of Edinburgh. They were "begun while its pupil, finished when its head." Our excuse for referring to them in this, a Legal Review, is the fact that the author is one of the very few great men who, having pursued the career of a successful lawyer, and reached the highest posts of professional honour which the legal profession affords, had in early youth a taste so remarkable for science and literature, that it is a marvel that he did not dedicate his whole life and powers exclusively to physical studies and letters. With almost every other man, ordinary or extraordinary, the alternative would have been the following of these pursuits exclusively, and not permitting a public and professional career to absorb his entire faculties. But Brougham was able to combine the reflective and experimental philosopher with the avocation of the advocate and politician. Law and politics were as eagerly and successfully attacked as pure mathematics or physical experiment; and this volume reveals to us how his active mind adapted itself to varied departments of knowledge, and how the studies of his youth and manhood are still viewed as some of the charms of his riper years.

With very few exceptions, the successful lawyers who, at Cambridge or elsewhere, achieve high honours, seldom revert to the exercises to which they dedicated the whole of their mental powers whilst at the University. If such, peradventure opening this volume of "Tracts," should let his eye fall on some of the symbols and figures once so

familiar to him—(the dx and dy , the y dx , and a variety of symbolic signs and lines with which we do not trouble our printer)—they would awaken for the most part a recollection of weapons whereby triumphs had once been gained, now long hung up in rust and shade; but they would not act as an incentive to again examine and handle them anew. Happy the man who, in old age, has preserved the love of those studies, which first excited his admiration and the powers of his intellect in early youth, through every period of his life. Few possess this great prerogative of genius. Moreover, the gift of thus occupying the intellectual faculty, rarely falls in with the opportunity which the acknowledged great men of the world possess.

This volume is indeed one of the most interesting contributions towards the history of a mental life which we have ever seen. We commend to those lawyers, few though they be, whose education and habits enable them to address themselves to these subjects, to examine the papers, and peruse the disquisitions contained in the volume.

Lectures on the History of England, delivered at Chorleywood, by William Longman (2nd lecture containing an account of the Feudal System, and origin of Laws and Government of England). London: Longman & Co., 1860.

CHORLEYWOOD seems to be a place where Mr. Longman has established an association for the advancement of the moral and intellectual condition of the labouring-classes, and this lecture is one of a series he has delivered to the association. We assume that Mr. Longman knew what was suitable to his audience; and that this lecture *was* so suitable is a subject of congratulation. The account on the cover of the lecture of the progress and proceedings of the association is very interesting; but we can only refer generally to it, counselling, however, any country gentleman who may assume to do good after the manner of Mr. Longman, to learn what he can of the system, and the incidents attending the foundation of the Chorleywood association, and its prospects.

We can only enumerate the following works, which we have received too late for further notice:—

Story's Commentaries on the Law of Bills of Exchange. Fourth Edition. Boston: Little, Brown, & Co., 1860.

A Treatise on the American Law of Landlord and Tenant; by John R. Taylor. Third Edition. Boston: Little, Brown, & Co., 1860.

A Treatise on the Medical Jurisprudence of Insanity; by T. Ray, M.D. Fourth Edition. Boston: Little, Brown, & Co., 1860.

Select Cases in Chancery. Temp.: Napier. Edited by W. B. Drury, Esq. Dublin: Hodges, Smith, & Co., 1860.

The Statutes, General Orders, and Regulations relating to the Practice and Jurisdiction of the Court of Chancery. By George Osborne Morgan, Barrister-at-Law. Second Edition. London: Wildy & Sons, 1860.

Events of the Quarter.

PARLIAMENTARY.—THE BANKRUPTCY BILL.—Upon the merits of this bill we have elsewhere fully entered; but upon the imperfect and indeed wholly erroneous statement of the Attorney-General in introducing it we must here make an observation, because it tended to mislead the public very materially. The profession could not be misled by it, because those branches of it which are interested in the subject are fully aware of the facts.

The Attorney-General described his task in amending the law, as rendered difficult only by the wrecks of former laws which covered the ground; and, in order to make good this description, he stated that the Act of 1831 (abolishing the Septuagint, as the seventy commissioners were termed), had substituted a new tribunal, and that this measure had only lasted a few years when it was replaced by another system in 1842, which after seven years was exchanged for the one of 1849. So far is this from being the fact, or anything like the fact, that the court established in 1831 exists at the present day, the change effected in 1842 (5 & 6 Vic. c. 122) being only the increase of its powers in summoning trader-debtors, and in granting certificates, formerly granted by creditors, and the extension of the system to the country by the appointment of district commissioners—while the Act of 1849 was only a consolidation of the former statutes, with the addition of giving the commissioners original jurisdiction without a fiat, and the adoption of the classification of certificates proposed by the London mercantile body.

Whoever instructed the Attorney-General respecting the history of the bankrupt law, and told him how well the Scotch system worked by adhering to the ancient jurisdiction of the Local Courts (Sheriffs' Courts) in Bankruptcy, should have informed him that Lord Brougham's County Courts Bill of 1833 vested this jurisdiction in the proposed courts. That bill was only lost by a majority of one on the third reading; and it had been thoroughly examined in committee of the whole house according to an agreement come to by Lord Brougham with Lord Lyndhurst, that it should be made as perfect as possible in detail, and then the vote taken on the third reading; but that, if passed, it should be in the shape which the committee had given it. Therefore the Attorney-general would have had the authority of the Lords substantively, and of Lords Lyndhurst and Brougham, in his favour upon the important branch of this bill, for vesting bankruptcy in the County Courts. The rejection of the bill of 1833 is deeply to be regretted. It decided the necessity of Lord Lyndhurst's Act for the appointment of district commissioners, whereas the Act would have entirely sufficed, and some hundreds of thousands would have been

saved to the country, besides removing the only difficulty which lies in the way of the Attorney-General's bill as regards County Court jurisdiction.

His informants have equally kept from his knowledge the great expense of the old system, which, upon the accounts obtained in 1831, shew the average of the incomes of the commissioners was about £500, and must have amounted to above £30,000 a-year out of the fund for distribution among creditors in the London district. The according of compensation from the consolidated fund was the greatest blot in the new system ; and that grievance of creditors, so much and so justly complained of, is now, we rejoice to find, on the point of being removed.

The Attorney-General's principal difficulty will be how to deal with the existing commissioners—who, having patent places, can surely not be treated in the manner proposed by the bill. But on this and the other parts of the proposed change we do not enter further, than to express a hope that care will be taken to prevent the former abuses from again springing up, by restricting the power of the official assignee, and that no door may be left open for fraudulent conduct in arrangements by amicable composition.

DIVORCE COURT.—Another Court of Law is before the legislature, with the view of ordering its procedure—we refer to what is popularly entitled the “Divorce Court.” In common with many whose attention had been directed to the congested state of business in this court, we have complained often and bitterly that no remedy for the most palpable evils was being provided by the legislature. This session, however, has seen a measure introduced by the Chancellor, having for its main object the removing of the obstacles by which the free and useful procedure of the Divorce Court has been impeded. Experience demonstrated what reason had predicted, that there would be great difficulty in collecting a full court, which had to be done by catching two unoccupied judges, to the end that these two judges should do the duty of one. It is now proposed to abolish the provisions whereby such unnecessary accumulation of judicial strength is wasted.

We cannot refrain from quoting a few sentences which fell from Lord Lyndhurst, on the debate in the House of Lords (17th April). He said, “Two years and a quarter had elapsed since the present Court of Divorce had been called into existence. During that period it had disposed of only 177 cases of divorce *à vinculo*, while 232 remained to be heard ; so that at that rate it would take four years to dispose of the arrear of business with which it had to deal, before the expiration of which time new cases would have accumulated. There were two courses open in order to meet the evil. You might either provide an additional number of judges, or enable the Judge Ordinary to discharge the functions of his office without being obliged to call in the Common Law Judges to his aid. The assistance of those judges had, he might observe, been made available up to the present time, to the extent of only sixty-five days, or about thirty days for each year since the establishment of the court, so that if the Judge

Ordinary were not empowered to dispense with their services, the arrears of this court could not be worked off before the lapse of the time which he had just mentioned. What course was it under these circumstances desirable to take? A divorce *à vinculo matrimonii* depended upon the result of a trial for the offence of adultery, and such trials were, generally speaking, of a most simple character, and for the most part depended for their decision upon matters of fact. He might add that, previous to the establishment of the Divorce Court, trials for crim. con., which were of a similar character, took place before a single judge, and that no man could more satisfactorily deal with such questions than the learned judge by whom the business of the court was at present with so much zeal and ability transacted—cases involving points of the utmost difficulty, such, for instance, as the nullity of marriage. Divorce *à mensâ et thoro* used also to be disposed of before a single judge in the Ecclesiastical Courts, while in the Equity Courts the Master of the Rolls and the Vice-Chancellors, sitting separately, decided upon questions—subject to appeal—by which the rights of individuals with respect to vast amounts of property were affected. His noble and learned friend on the woolsack had referred to the assizes, where cases of great magnitude as regarded the property at stake, and of great intricacy in point of investigation, were continually decided by a single judge. Questions of the utmost nicety in criminal law were decided by the same tribunal. Why, therefore, should they not trust the judge of the Divorce Court to sit alone in deciding the cases which came before him? Reference had been made to the power conferred in the Act of Parliament of calling in the assistance of one of the judges of another court in cases of great difficulty—a power similar to that which was exercised by the judges of almost every court. A noble and learned friend [Lord Brougham], who was not now present, and who was, he believed, at that moment in the neighbourhood of a very excited and disturbed population—had called attention to the question of collusion, against which he maintained that it was most important to guard. Undoubtedly collusion ought to be guarded against, but how were *three* judges sitting in a court more competent for this purpose than a single judge? A clause had been very properly added to the bill, by which the Queen's Proctor was authorized, at the desire of the court, to appoint some person to investigate the case,—partly, he had no doubt, with a view to the detection of collusion. Whether this provision would be effectual for the purpose he would not pretend to say; but, at any rate, that was not the question which was now before the House. He was satisfied their lordships would feel the absolute necessity, both in order to uphold the power of the law, and the credit of the constitution, that justice should neither be delayed nor refused. The present condition of business in the Divorce Court was, however, productive of the greatest possible delay, amounting to a refusal of justice. On every ground he hoped the bill would therefore be read a second time, unless any other measure remedying the inconvenience to which he had adverted could be pointed out by any noble lord."

Although we concur in the truth and force of these remarks, and have always been contending for such a measure as Lord Lyndhurst has approved of, we know that others whose opinion we respect hold opposite views. We have, for example, before us the judgment of an eminent lawyer, and one not wont to take a narrow or timid view of such matters. He writes :—

“The state of this court has been the subject of remark in the House of Lords, and led to a bill introduced by the Lord Chancellor on Lord Lyndhurst’s suggestion. Its chief provision is to give the Judge Ordinary all the power now vested in the full court ; that is, to enable him to grant a divorce *à vinculo* as well as a judicial separation. This is a very questionable matter, and it can only be defended upon the assumption that the attendance of the other two judges is a mere form, and that they always concur with the Judge Ordinary. If it be so, they do not discharge their duty ; for divorce was held by the legislature to be so very different from judicial separation, which a single judge, in the Consistorial Court, had always been competent to grant, that when the New Court was substituted for Parliament, it was held necessary to have it differently composed in cases of full divorce, and two common law judges were added to the Judge Ordinary. It may be said that in the House of Lords, which substantially exercised the power of divorce by bill, the Lord Chancellor, or other law lord presiding, generally speaking, disposed of the case. But there was this material difference between that decision and the decision of a single judge in the New Court, that parties having, or supposing they had, an interest in promoting or preventing the divorce, had always access to any law lord or lay peer, as well as to the presiding lord ; and, in many instances, suggestions or information thus conveyed influenced the conduct of the decision. In the New Court such communication with the judge is manifestly impossible. Therefore, a single judge pronounces for or against the divorce.

“There is, however, a very important power given to him, in case only one party appears in any cause. He may, if he thinks fit, direct the Queen’s proctor to employ counsel to argue on the other side, so that important questions may not be disposed of by an *ex parte* hearing, as very lately one of the utmost importance and difficulty actually might have been ; but I believe the decision has not yet been given. I need not observe that this provision leaves to the Judge Ordinary the power, if he chooses to exercise it, of deciding all questions whether argued fully before him or *ex parte*.

“The necessity of extending this power to all cases, whether both parties have appeared or not, has been so often urged in the pages of your Magazine, that I need not repeat the argument for it now. The intervention of the Attorney-General or his deputy, to prevent fraud and collusion from misleading the court, proposed by Lord Brougham, and introduced by the Lord Chancellor into the bill of last session, was unfortunately rejected by the House of Commons. Hardly a week has passed since, in which occasions have not arisen, showing the necessity of affording the court this protection, and it is to be hoped that the provision will be added to the present bill.

"I need scarcely add," continues the same writer, "that in the above remarks there is nothing further from my intention than to express disrespect towards Sir C. Cresswell, or the least distrust of him. In him, if in any person, the power of divorce may be safely vested. My objection is quite general, and arises from a deep sense of the extreme importance of the proceeding which is to dissolve a marriage validly contracted and publicly solemnized."

PENDING BILLS.—Among pending bills are the "Attorneys' Solicitors' Proctors', and Certificated Conveyancers' Bill," as to which very different opinions seem to have been expressed in the House of Commons; and indeed there seems to have been some clauses very improperly foisted into the bill which will probably be cut out in committee. The tactics of mixing objectionable provisions along with those generally approved of, and so endeavouring to pass a bill by a ruse, appears to have been tried on rather boldly in this case, and it is not a very creditable transaction.

Lord St. Leonards has also a bill, which is now before the Lower House, to amend his "Property, &c." Act of last session. One of its important objects is to do away with the effect of judgments on the title of *bona fide* purchasers, unless the writ of execution has issued. The bill contains, moreover, most of the other provisions which had been originally in his Lordship's former bill (so often referred to by us), but which the Commons, in the exercise of their sapience, struck out.

Lord Cranworth has just introduced a bill relative to trustees, executors, mortgagees, &c., the objects of which are admirable. It proposes to give to such persons those powers which are always given to them in well drawn trust-deeds, mortgage deeds, and wills. We have not been able to examine the details of this measure, and therefore refrain at present from further comment thereon.

CRIMINAL LAW CONSOLIDATION BILLS.—These bills are referred to a select committee of the House of Lords. This was a necessary step; for a casual glance by Lord Lyndhurst revealed to him gross blunders—for example, the enacting of inconsistent punishments for the same offence. Lord Campbell was not at all pleased with this statement of Lord Lyndhurst, and said if notice had been given him of the errors in question, he might perhaps have explained them. He had spent "hours and hours in examining the bills," he said, and "had taken great pains" to ensure their accuracy. Nevertheless, accurate they are not. There is a rottenness in the principle of bill-making which will account for these repeated and mistifying failures.

LOST BILLS.—Among the legislative doings ought to be enumerated certain of the more striking of the rejected measures, which evince the wisdom of the legislature equally with the bills passed; we will, therefore, give a few examples of the class of lost bills. One of these, which was thought by its proposers to be of immense importance, was "The Religious Worship Bill." By this bill it was proposed to enact that any minister of the Church of England might "celebrate divine

service in any private house, or on the premises belonging thereto." The principal objection urged against this bill was, what some were pleased to term the vagueness of its language. "What was meant," said they, "by 'the premises,' belonging to a private house?" According to Dr. Johnson, the word premises "in low language," is used to designate *houses or lands*. But low language is not made use of in Acts of Parliament, and moreover the context would not admit of this meaning. In auctioneers' "Particulars of Sale," however, we frequently find a desirable property described as "All that Capital House and Premises, situate, &c.," and it is generally understood that "premises" in these descriptions refer to the dust-hole, the coal-cellars, and other outlying conveniences appropriated to the use of the domestics of the establishment. The meaning therefore of the bill was perfectly clear. It would have enabled any minister of the Church to demand entrance at any private house, whether occupied by a member of the Church of England or not, and to celebrate divine service either in the house itself, for the benefit of its master and his family, or in any of the outlying "premises" we have above alluded to. Against the *principle* of this wise measure surely no exception can be taken by Christians; but, nevertheless—whether from the admixture of the Jewish element in the Commons or no, we cannot say—the bill was lost.

A second bill, to which we may refer, proposed to enact that any body who let "any person, *other than a tradesman* or his apprentice, stand, sit, or kneel on the sill of any window, or to be on the outside of any window, in order to clean, paint, or perform any other act with regard to any window or any house or other building, or any thing growing thereon or affixed thereto, shall, unless such window be in the sunk or basement story," be liable to certain pains and penalties. This also, we think, would have been a very excellent measure if it had been subjected to a little verbal amendment in committee so as to remove certain incongruities. For instance, a bricklayer's labourer is a bricklayer's labourer, and neither a tradesman nor a tradesman's apprentice; and it is not very apparent why a grocer, or a chemist, or a hairdresser should be permitted to paint the outside of a house, and a bricklayer's labourer be forbidden to perform a like operation. Moreover, a person standing on a balcony on the first floor of a house would undoubtedly be "outside a window," and if there in order to let down an outside sun-blind, or to perform any similar act, would (unless he should happen to be a grocer, or a chemist, or other tradesman,) be doing a prohibited act. These, however, were but slight objections to the bill, which might easily have been remedied. Here again the principle of the bill was good, for we have often seen labourers and others in very dangerous positions outside houses.

If this measure had met with the approval of the House, it was, we understand, the intention of a philanthropic member to introduce a bill "for the better protection of washerwomen." By this bill it was proposed to enact, that any person who should permit any washerwoman to wash any clothes or other articles, in any water in which any

soda or other deleterious material should be dissolved, should be guilty of a misdemeanour, and should be punishable, &c. ; and that any washer-woman, washer-girl, or other washer-person, who should neglect or refuse to wear pattens, clogs, golosh, or other overshoe or shoes, or in any way abstain from protecting her in, out, or other side or sides from damp, moisture, humidity, or other wet, should be subjected to certain penalties therein described.

Joking aside, it is high time that such folly as the Religious Worship and Window-cleaning bills, or Lord Chelmsford's "Sabbath-day butchers' and bakers' bill," should no longer be allowed to waste the time, and try the patience of the Houses of legislature.

BARON WATSON.—The sudden death of Baron Watson at Welshpool, on the 12th March, is an event which has caused deep regret throughout the profession. His frank honest character rendered him a very popular man during his long career. From 1811 to 1817, he was in the army (1st Royal Dragoons). He then joined the legal profession, and enjoyed first as a special pleader, and afterwards at the Common Law bar, an extensive practice. In 1843, he was created Queen's counsel. His two works on Arbitration and the Office and Duties of Sheriff have become standard books with lawyers.

His oratorical powers were not of a high order. Earnestness and energy, however, supplied the place of finished eloquence and correct style. He ever stood up so bravely and honestly in his client's interests, that his awkward language and obscure expressions were overlooked by the tribunals he addressed ; moreover he "knew his law," and when he had a bad case, he never sheltered himself at the expense of his client's cause. There were few leaders with whom junior counsel felt safer.

He was a very genial man, and possessed that excellent gift for barristers, whether in court or on circuit—that of being a good narrator of anecdotes. The "General," as he was often called, was, as the leader of the Northern Circuit, highly esteemed by its members ; and be it remembered the character and comfort of a circuit depends much upon the social and personal qualities of its leaders.

He was promoted to the Bench in 1856, having been passed over on several occasions, when he and his friends thought he had a right to be appointed a judge.

He sat in Parliament first for Kinsale, and afterwards for Hull, on the Liberal interest. He was only sixty-four when he died.

THOMAS JARMAN.—A name familiar to the English jurist will henceforth be missed from the roll of practising lawyers. On February 26th, in the present year, after a practice at the Bar of thirty-four years, Thomas Jarman died.¹ We say his *name* will be missed, for

¹ He was called by the Middle Temple in February, 1826.

few were acquainted with the man himself. The victim of severe disease, and eccentric in habits, Mr. Jarman was personally less known in the profession than any other counsel of equal eminence. Though his memory will long survive in his works, it is not fitting that the man should pass from among us without some, though it be inadequate, notice in our pages. We will avail ourselves of the well-written sketch in the *Solicitors' Journal*¹ (March 10th) for the few facts we shall here mention relating to Mr. Jarman. The writer of this sketch had fortunately the advantage of obtaining some interesting information upon the subject of the memoir from Mr. Hayes, the well-known conveyancer, who perhaps is one of the few persons competent to give an authentic statement about the life and character of his ancient friend. Speaking of Mr. Jarman's publications, Mr. Hayes writes²—

"Those works which are now in every counsel's and judge's hands, were composed under physical difficulties, over which nothing but moral courage, almost heroic, could have triumphed—the works of a laborious valetudinarian and energetic cripple. The earlier, and indeed greater, part of his life was spent 'in helping (to use his own words) other men into their carriages,' or at any rate to easier seats in their carriages. As a lawyer he was entirely self-educated, with the exception of such schooling (not completed) as the practice of a Bristol attorney's office could supply. And with this minimum of instruction, and his own much larger unindebted acquisitions, aided by a strong yet modest consciousness of power, the raw youth came to London scarcely less well prepared, or in any respect less competent to write a standard work on Wills (or even to supply that grand desideratum, a treatise on instruments generally), than at any after period of his professional life. His habits of study throughout a considerable portion of the period which produced his 'Wills' and his 'Conveyancing,' were primitive and pastoral. He read, thought, and worked in open air; his study, a garden, green lane, or paddock; and that, under all skies, and in all weathers, and through all seasons. Of the work done in chambers, much was done in severe weather, with open windows, and without a fire. Though I could not quite harden myself to those extremes, yet our tastes were so far alike, that it was our wont in those early days of 'Jarman's Powell,' to discuss points and settle them very much to our own satisfaction, and eventually in some instances, to the satisfaction of the judicature, at Jack Straw's Castle, the Woodman of Old Norwood, and on the Cotswold. I well remember on reading in manuscript the chapter which treats of cross-remainders, being so much struck with its lucid mastery of the subject, that I immediately took it to my acuter and more experienced friend, R. H. W. Ingram, then practising in the Temple, who at once acknowledged its superiority to Cruise, then and, to the discredit of bar and bench, for some years afterwards, cited as

¹ We take this occasion to draw attention to the general literary excellence of the Papers and Reviews in the *Solicitors' Journal*. Their tone and style merit acknowledgment at the hands of a liberal profession.

² Vide *Solicitors' Journal*, March 10.

oracular. The proofs were supervised by both, but with more critical attention by Ingram, who contributed more or less to the accuracy of Jarman's labours; but the whole amount of such aids left the sterling and staple matter of the annotations and supplementary volume, exclusively the product of the editor's own talent and research, under circumstances far from propitious. When all was ready for publication, a patron was to be sought, and Lord Eldon was obviously the fittest name for such a work. Jarman sketched out a dedication, and, being then our visitor at Peckham, read it to us in the evening; but I objected to its wanting spice and unction, and came down the next morning with something more easy, against which Jarman in his turn protested, but which, somewhat lowered in its tone of adulation, he rather reluctantly adopted; and this is the dedication which (I think) Horace Twiss, in his 'Life of Lord Eldon,' cites among other testimonials in proof of the high judicial reputation of the greatest of the Great Seals of later times.

"The progress of 'Jarman's Powell' was slow and obscure. Powell was a *caput mortuum*, weighing down a living body of sound law; Jarman a vitality, dragging about with him a sort of semi-defunct Frankenstein. I have an impression, but it may be erroneous, that Mr. Baron Parke was among the first to discover the value of the work on Wills, and bring it into court—though probably it first struck root in the dusty chambers of conveyancers, and thence gradually spread over Westminster Hall, where very possibly it may have assisted in the solution of many a problem before it found either the hardihood or candour requisite to cite and commend it as a text-book. Sweet, the publisher, used to insinuate, as I understood Jarman once to say, that a book on Devises was 'caviare to the general,' and that a much brisker sale would have been ensured by the more intelligible title of a treatise on Wills. In this there may have been something of sly irony. By the way, in any sketch of Jarman's professional career, justice ought to be done to Sweet as a bold and liberal patron of young untried writers.

"Poor Jarman's labours were repeatedly suspended, sometimes apparently brought to a final close, by serious illness: first (while Powell was in hand), by an affection of the eyesight; then by an abscess extending nearly from hip to heel, and terminating in a fixed limb, and more recently by an attack so severe that both body and mind were supposed to be hopelessly prostrated; but he survived these (and other) trials, to resume and complete his laborious undertakings, and to work on at conveyancing generally, but more especially the case department, with increasing reputation and practice to the last. Nothing could subdue his fortitude or disturb his equanimity. *Æquum memento rebus in arduis servare mentem*, was the Pagan motto of the Christian soldier."

The vicissitudes of Jarman's professional career are thus referred to by the writer in the Solicitors' Journal:—

"Three times in the course of his career had Mr. Jarman to seek relief from pain and illness by a temporary relinquishment of his profession; and on his return to practice he had, of course, each time to commence anew. It is no wonder, therefore, that those who knew

him well—and from his weak state of health they were necessarily few—speak with enthusiasm of the heroism of his character. So great strength of will, and so resolute a purpose, are not given to many who are troubled with such weakness of body. Even in his temporary seclusion, while the victim of painful disease, he was still to be found working at his books, although unfit for the more regular and active duties of his profession. At such times his delight was to have as much of his library as possible around him in the open air; if in the middle of a field so much the better. On one occasion a friend found him standing at a desk under a tree in one of his fields, with law-books lying all around him, in a space from which the snow had just been cleared away—one of his peculiarities being his antipathy to fires, and his indifference to even severe degrees of cold. It was well for him that he loved the work for its own sake; for, great as was the ultimate success of his first and best effort, he has been heard to say that his pecuniary returns from it never exceeded an allowance of eighteenpence a-day for the time during which he was occupied in writing it. Such honours and emoluments, however, as may fall to the lot of conveyancing counsel were not denied to him, except so far as the latter might be lessened by the effect of his chronic indisposition."

Thus, without fortune or connection, and in spite of many and grievous difficulties to be surmounted only by moral courage and intellectual vigour, Mr. Jarman achieved a notable place in the profession, to which, moreover he has done eminent service as an author. The successful lawyer of the courts, who is seen and heard every where, as soon as he has run his course is never again called to professional or public recollection. He has filled the stage for his day, and makes way for others as good as he, who in their turn engage all the attention of the spectators. The retired chamber counsel, on the other hand, who has dedicated his best faculties to expounding by his pen the jurisprudence of his country, survives as long as the law itself with which he has connected his name.

As a writer, Mr. Jarman was by no means elegant—nay, sometimes his style was obscure. The difficulty he had of expressing his ideas in perspicuous language, was probably the reason why his drawing was never admired by the best judges of the art of conveyancing; nor had he received, in his early professional career, that best of legal education, which consists in actual *drawing* under the eye of an able master, and gathering experience in chambers well supplied with varied work. Moreover, some men's minds are better fitted for fixing on points and elaborating principles, whilst the skill of others, who form the larger portion of the class of practical and successful lawyers, apply rules and deal with facts in the manner most useful to the world, which rewards them accordingly. For such reason Mr. Jarman probably never had a large or leading general business as a conveyancer corresponding to his reputation.

A memoir of Mr. Jarman, which merely referred to his ability and fortitude, would omit the mention of qualities which were even more admirable than these—that patience and kindness which seemed nourished by what might well have soured or irritated a person of a

different character. He was, it is true, respected for his professional attainments by those who had not his personal acquaintance; but his friends will remember with enduring regard, that he was not only an able lawyer, but a generous, unworldly, kind-hearted, and Christian man.

JELINGER C. SYMONS.—On the 7th of April, died at Great Malvern, after an illness of a few months' duration, and at the age of fifty years, Jelinger Cookson Symons.

Death has taken from the world a good and accomplished man, the chief feature of whose character was an energy of singular intensity, devoted to the moral and intellectual improvement of mankind. Descended from a family, the members of which for several generations had been of the clerical profession, it was at first intended that he should follow the same vocation; but early in life he himself chose the profession of the law as more suitable to his active mental propensities. We think he chose well: for, although through life he was habitually under the influence of religious feeling, the quiet duties of a clergyman would hardly have sufficed for his impetuous temperament. He might, perhaps, have been too active.

After having taken his degree at the University of Cambridge, he travelled abroad for several years, and in 1843 he was called to the bar by the Society of the Middle Temple. He practised at the Gloucester quarter-sessions and on the Oxford circuit; and his chief ambition was to attain a seat in parliament, with which object he was more than once unsuccessfully a candidate at Stroud. At this period of his life he was for several years the editor of the *Law Magazine* prior to its union with the *Law Review*.

From both roads to professional preferment, the Bar and the House of Commons, he was, after having been engaged as a government commissioner in some special investigations referring to education and labour, withdrawn, by being appointed an inspector of schools. In the duties of this important office, varied by literary and philanthropic pursuits, the remainder of his life was spent.

Had a longer interval elapsed between the time of his death and the preparation of this brief memoir, we should have gladly enumerated some of the many philanthropic efforts in which he took part; but we must here content ourselves with a reference to the share he had in the establishment of reformatories for juvenile criminals. He was one of a few gentlemen assembled at Hardwicke, and consulted by Mr. Barwick Baker at the foundation of the first of these institutions, which he deemed one of the chief steps in the progress of mankind towards moral good.

Having known him intimately, it would be wrong for us not to refer to a very salient point of his character—his love of controversy. He was an intellectual gladiator, always ready for a contest, whether in conversation or debate or in writing; but his object was less victory than

the attainment of truth. To him mental conflict was more than a pleasure: his share of it often assumed the place of a duty.

For ourselves, we could never perceive any real importance in the controversy into which, a few years since, he found himself suddenly launched by reason of a letter addressed by him to the *Times*, on the subject of the words used by astronomers in explaining the well-known fact of the moon always presenting the same side to the earth. This controversy, which made him very conspicuous at the time, seemed to us to be more verbal than real.

Of many of his literary works we have not here space to make mention; but we may refer to two—one on the character and conduct of Sir Robert Peel, the other on the Burke family, and purporting to identify William Burke as Junius. Both of these works are interesting contributions to English history.

To the latest period his assiduity and his capacity for labour were wonderful. Indolence was irksome to him. Work was his great pleasure. It was most interesting to see our ardent friend when, as he knew, death was slowly but surely approaching. At times he thought his disease might relent, and that he might again be an active member of the community; but his prevailing state was that of a man quietly and serenely awaiting the last change, forgiving, and hoping to be forgiven by those with whom his quick temper or his urgent sense of duty had brought him into conflict—looking forward to a future existence not merely as a state of happiness, but as a state of being in which a man's intellect, cultivated and improved in this world, will have a yet wider sphere of contemplation and action. Rejoicing in this—always his favourite thought—he died, expressing no other regret than that of leaving his wife and his children.

J. F.

THE BROUGHAM PEERAGE.—By an act of remarkable graciousness on the part of her Majesty, this peerage will descend to Mr. William Brougham and his heirs-male. There are, we believe, but two other instances where, on account also of eminent service rendered to the country, a similar limitation of title has been conceded—those of the Nelson and St. Vincent Peerages.

The announcement of this royal act has been received with universal satisfaction, affording evidence that the victories accomplished by a great social and legislative reformer, are now held in no less esteem than were bloody battles, and the vanquishment of foreign foes.

ANTIQUARIANISM IN THE TEMPLE.—We do not under ordinary circumstances, for reasons that will only be too obvious, chronicle the proceedings of societies like the London and Middlesex Archæological Society, even though they may discuss, as part of their proceedings, legal antiquities; but the advent to the quiet courts of the Inner and Middle Temples of this young and prosperous society, in quest of

objects of antiquarian interest, may not be considered altogether an irrelevant topic in our "Events of the Quarter."

On the morning of the 12th ultimo, some seven hundred ladies and gentlemen, representing the members of the London and Middlesex Archæological Society, and their friends, commenced the proceedings of their long-meditated visit to the Temple, by assembling in the hall of the Middle Temple, than which no more worthy or suitable place could possibly have been selected. The Master of the Temple, the venerable Archdeacon Robinson, took the chair, and in a few well-chosen remarks welcomed the assembled visitors to the Temple; a variety of papers were then read, and, after viewing the structure of the Middle Temple hall, the sister building of the Inner Temple was visited by the company, as also was the old crypt beneath it, now used as a wine-cellar. The Temple Church proved a grand attraction to the visitors, although the bad taste there perpetrated, together with the spoliations and destructions caused in the "restoration" a few years ago, were rather severely animadverted upon by those who undertook to describe the interesting and venerable structure. We extract, by way of conclusion of our necessarily brief notice, some passages from a paper read by a learned member of the Middle Temple (Mr. Bassett Smith, F.G.S.), on the Temple and the Templars:—

"The site of the Temple is mentioned in the legends of pre-historic times, and as in connection even then with the law, it being said that it was selected and hallowed as a place of religious legislature, and judicial assembly and sanctuary, by Dyonwal Moelmud.

"Dyonwal Moelmud reigned over the Lloegrian kingdom, of which London was the metropolis, in the right of his mother, the *merch* or daughter of the preceding king, about four hundred and thirty years before the birth of the Saviour. He was the Justinian or Alfred of his age, and reduced the oral laws of the Bardic form of the patriarchal system, under which Britain was then governed, to a simple and philosophical code, still extant, and preserving the ancient Triadic form. This Temple must, according to these laws, have been so constructed as to serve to the assembling of the Legislative and Judicial body, that is, the Bards, Ovates, and Druids, in a conspicuous manner, 'in the face of the sun and the eye of light, and under the expansive freedom of the sky,' that the people might gather round it, and all, whether 'country or aristocracy,' see and hear. It would consist of a circle of stones, so placed as to allow a man to stand between each two of them, except that, between the two facing the east, there should be space for three men between them, to allow easy ingress to the circle. In front of the circle, at a distance of at least three fathoms, were placed three stones called *station stones*, so as to face the Eastern cardinal point, and the positions of the sun at rising on the longest and shortest day, and that lines drawn through them from a great stone in the centre would mark those positions, these lines representing also the name of God, and mystic mark of the Bardic system, the circle symbolizing the circuit of the sun, and the idea of the Deity himself, with the states of creation both visible and invisible.

"The site of the present Temple was such as Bardic laws required

immoral exculpation of its conduct. It offers to the public this extenuation, that the fight was an exceptional piece of blackguardism, and that the public being deeply interested in it, the leading newspaper was bound to feed the brutal appetite for a full narration, by supplying an elaborate account of the disgusting scene. The public was, in fact, interested in it, by reason of the newspapers continually fostering curiosity, and creating the very excitement alleged as the excuse for reporting the vile transaction at Farnborough. If this justifies the conduct of the *Times* and other newspapers, henceforth no immoral and unlawful practice can be kept out of its columns in all its detail.

Not only in itself and its concomitants was this brutal fighting a gross and disgusting outrage, but in its consequence it will prove a source of general demoralization. The fighting men have been elevated to the rank of heroes; and in every town, district, and village, we shall find for some time yet the example of the great miscreants, followed by minor brutes, thus encouraged to emulate their superiors. A stimulus has been supplied which assuredly will not fail to bear a bountiful crop of blackguardism.

It has been contended by a writer of a little work entitled "*Habet*," that prize-fights are not unlawful. He says, two men agreeing to box cannot complain mutually of assaults committed on each other; and that no one who witnesses a lawful act like that of boxing, is accessory to a crime. It would therefore follow that a duel with dangerous weapons is likewise lawful, and that the act of congregating the vilest body of ruffians to witness a demoralizing spectacle is a legal act. This law is as bad as the morality of the act under discussion, and need not be further canvassed.

There will always be a class of men who delight in scenes of depravity; but we were not prepared for such a wide-spread taint of brutality as we have lately experienced. But we trust the approbation of the outrage was not so universal as represented. "Every body," say the papers, "talked of this fight." So every body talks of a frightful murder. But not in admiration of the crime. There is no doubt, however, that curiosity did outrun good feeling on this subject; and, as influential people did not express their abhorrence of the prize fight, small people thought it no harm to talk foolishly about it.

The St. George's in the East disturbance provides additional evidence of the necessity which exists for putting down with the strong arm of the law the brute force of mob government. The Sunday exhibition of foolish pastors and brutal congregations are doing immense injury to the moral character of this country. Prize-fighting and parish church riots are alike disgraceful to a nation affecting to be civilized. To talk of fair fighting in the one case, or supporting principle on the other, is a ludicrous abuse of language.

The seconds and partisans of the pugilists have quarrelled as to who was the victor in the one case, and noisy fools on the other litigate as to who has the right to continue to harass his theological antagonist. *Sayers v. Heenan*, and *King v. Rosier*, deserve to be reported together. These two transactions, however, appear to be contemplated by the Home Secretary with entire complacency.

APPOINTMENTS, &c.

James P. Wilde, Esq., Q.C., of the Northern Circuit, has been elevated to the seat on the Exchequer Bench which became vacant upon the decease of the late Mr. Baron Watson. Mr. Wilde was called in the year 1839.

Mr. (now Sir) E. S. Creasy, of the Home Circuit, who has long been known as an able and accomplished lawyer, has been appointed Chief Justice of Ceylon.

On the retirement of R. E. Broughton, Esq., I. O. Secker, Esq., the magistrate of the Greenwich Police Court, was transferred to the Marylebone Police Court; and D. Maude, Esq., Police Magistrate at Manchester, succeeds Mr. Secker.

T. Stamford Raffles, Esq., Judge of the Court of Record for the Hundred of Salford, has been appointed Stipendiary Magistrate at Liverpool in the room of Mr. Mansfield, now Magistrate of the Worship Street Police Court, London; and T. Wheeler, Esq., of the Northern Circuit, has succeeded Mr. Raffles as Judge of the Salford Court.

James A. Yonge, Esq., of the Western Circuit, has been appointed Recorder of Bideford and Barnstaple; and James Jerwood, Esq., of the same Circuit, has been appointed Recorder of Southmolton.

Mr. Stapylton, the County Court Judge, has resigned the Recorder-ship of Durham, and the Town-Council has nominated Mr. John Bramwell, attorney, to fill the vacant office.

Mr. Ratcliffe Pring, Barrister-at-law, has been appointed First Attorney-General of the colony of Queenstown, New South Wales.

Mr. Dart, the author of the well-known "Compendium of the Law and Practice of Vendors and Purchasers of Real Estate" has been appointed one of the Conveyancing Counsel to the Court of Chancery, in the room of the late Mr. Jarman.

IRELAND.

Mr. Fitzgerald, the Attorney-General, has been appointed to the Judgeship in the Court of Queen's Bench vacated by the resignation of Mr. Justice Perrin. Mr. Serjeant Deasy, the Solicitor-General, thereupon succeeded Mr. Fitzgerald as Attorney-General, and Mr. Serjeant O'Hagan was appointed to the office of Solicitor-General.

Charles Hemphill, Esq., Matthew O'Donnell, Esq., and William Jenkins, Esq., have been called to the Inner Bar.

CALLS TO THE BAR.

Hilary Term, 1860.

MIDDLE TEMPLE.—John Malcolm Sewell; Edmund Phillips Wood; Edward Henry Harvey; Richard Napoleon Lee; and Bassett Smith, Esqrs.

INNER TEMPLE.—Francis Joseph Coltman; William Court Gully; John Martineau Fletcher; Alfred Cutbill; and Gatewood Coleridge Davis, Esqs.

LINCOLN'S INN.—Henry Allison Pottinger ; Andrew Richard Daubeney ; Francis Smale Drake ; William Hale Willats ; John Rigby ; Andrew Commins ; Cecil James Monro ; William Hornby Birley ; James George Edwards ; Henry William Woodbridge ; Richard Yapp, jun. ; Henry Mainwaring Sladen ; William Leverton Donaldson, the younger ; Dennis Milner ; Newdigate Hooper Kearney Burne ; William Charles Harvey, and Edward Rudge, jun., Esqs.

GRAY'S INN.—Hugh Shield (holder of the Studentship awarded by the Council of Legal Education in the present Hilary Term) ; John Edwards (certificate of honour of the first-class, awarded in the present Hilary Term) ; James Cornelius Brough, and Lionel Uniacke Steele, Esqs.

EXAMINATION OF CANDIDATES FOR ADMISSION ON THE ROLL OF ATTORNEYS AND SOLICITORS.

The following Prizes and Certificates have been awarded by the Incorporated Law Society to Candidates under the age of twenty-six years :—

Hilary Term, 1860.

Prizes of Books were awarded to—

J. O. H. Taylor, R. J. Littlewood, John Shoard, LL.B. ; John Batchelor ; and C. W. Duncan, Esqs.

Certificates of Merit were awarded to—

G. H. Chambley, M. Matthews, J. C. Sikes, and J. W. G. Wollen, Esqs.

The Examiners also announced that the answers of the following Candidates to the questions at the Examination were highly satisfactory, and would have entitled them either to Prizes or Certificates of Merit, if they had been under the age of twenty-six :—

O. T. Foster, Henry Murray, H. W. Parker, and Thomas Ponsford, Esqs.

Recrology.

December.

- 6th, WORTHINGTON, GEORGE, Esq., Senior Solicitor to the Real Property Commissioners of Adelaide, South Australia, late Dock Solicitor of Liverpool, aged 70.
29th. KEDDELL, FREDERICK, Esq., Solicitor, aged 51.

January.

- 24th. SPAROWE, J. E., Esq., Solicitor, aged 71.
25th. CRESSWELL, ROBERT N., Esq., Barrister, aged 67.
28th. PERRIN, JOHN, Esq., Barrister, aged 43.
29th. BOOTH, JOHN, Esq., Solicitor, aged 58.

February.

- 3rd. NEALE, HENRY ST. JOHN, Esq., Solicitor.
" HIGGINBOTTOM, JOSEPH, Esq., Solicitor.
4th. NEWTON, THOMAS H., Esq., Solicitor.
7th. SOLOMON, JOSEPH, Esq., Solicitor.
8th. WILMOT, WILLIAM, Esq., Solicitor, aged 51.
" GIDLEY, THEODORE C., Esq., Solicitor, aged 51.
10th. HUXLEY, HENRY T., Esq., Barrister, aged 54.
11th. PAYNE, WILLIAM E., Esq., Solicitor, aged 39.
19th. GRANGE, RICHARD, Esq., Solicitor.
" SAXELBYE, THOMAS, Esq., Solicitor, aged 55.
22nd. GRENFELL, ST. LEGER M., Esq., Assistant Judge at Cudassa, Madras.
27th. PARKER, THOMAS, Esq., one of the Benchers of the Hon. Soc. of Gray's Inn.
29th. HARDING, THOMAS, Esq., Solicitor.
" SCOTT, JOHN E., Esq., Solicitor, aged 66.

March.

- 4th. MESSITER, GEORGE, Esq., Solicitor, aged 69.
8th. LEMAN, JAMES J., Esq., Solicitor, aged 62.
10th. WILLIAMS, THOMAS, Esq., Solicitor, aged 64.
13th. TABLETON, FRANCIS W., Esq., Solicitor, aged 41.
" WATSON, SIR W. H., one of the Barons of the Court of Exchequer, aged 64.
16th. AUSTIN, GEORGE, Esq., Barrister.

- 18th. WHIPHAM, THOMAS H., Esq., Barrister, aged 53.
- 19th. M'CARTHY, DANIEL, Esq., Barrister.
- 21st. BASS, THOMAS B., Esq., Solicitor.
- 24th. GILL, FRANK S., Esq., Solicitor.
- 24th. WILKINSON, THE HON. WILLIAM L, one of Her Majesty's
Judges of the Island of Jamaica.
- 27th. THAIRLWALL, FREDERICK, Esq., Solicitor.

April.

- 4th. WALLINGER, MR. SERJEANT, aged 63.
- 7th. MARTINEAU, PHILIP, Esq., one of the Taxing Masters of the
Court of Chancery, aged 69.

List of New Publications.

Baily.—Perils of the Sea, and their Effects on Policies of Insurance. By L. R. Baily. 8vo, 12s. cloth.

Davidson.—Precedents and Forms in Conveyancing. By C. Davidson, T. C. Wright, and J. Waley, Esquires, Barristers. Third Edition. To be completed in 4 vols. Vol. I. royal 8vo, 28s. cloth.

Drury.—Select Cases Argued and Adjudged in the High Court of Chancery during the time of Lord Chancellor Napier, in the years 1858 and 1859. Edited by W. B. Drury, Esq., Barrister. Royal 8vo, 32s. boards.

Erskine.—Principles of the Law of Scotland. By J. Erskine, Esq., Advocate. A New Edition, adapted to the present state of the law. By J. G. Smith, Esq., Advocate. 20s. cloth.

Francillon.—Lectures, Elementary and Familiar, on English Law. By J. Francillon, Esq., Barrister. First Series, 8vo, 8s. cloth.

Hodgson.—Instructions for the use of Candidates for Holy Orders ; and of the Parochial Clergy as to Ordination, Licences, &c. By C. Hodgson. Eighth Edition, 8vo, 12s. cloth.

Langley.—A Reading of the Act to Further Amend the Law of Property and to Relieve Trustees, 22 and 23 Vic. cap. 35. By A. G. Langley, Esq., Barrister. Foolscap 8vo, 5s. 6d. cloth.

Lindley.—A Treatise on the Law of Partnership, including its application to Joint-Stock and other Companies. By N. Lindley, Esq., Barrister. 2 vols, royal 8vo, 48s. cloth.

Lucas.—The Perils of Trusts and Trustees. By R. de Neufoille Lucas. Post 8vo, 3s. 6d. cloth.

Maugham.—A Digest of the Examination Questions in Common Law, Equity, Conveyancing, Bankruptcy, and Criminal Law, from Hilary Term, 1853 ; with the Examination Rules, Instructions to Candidates, Forms, and Practical Directions. By R. Maugham. Eighth Edition, 12mo, 6s. cloth.

Morgan.—The Statutes, General Orders, and Regulations relative to the Practice and Jurisdiction of the Court of Chancery, with copious Notes, containing a Summary of every Reported Decision thereon to Easter Term. By G. O. Morgan, Esq., Barrister. 12mo, 18s. cloth.

M'Phun's New Pocket Lawyer.—A Popular Digest of the Law of Scotland, according to the latest Decisions and Authorities. By the Old Lawyer. Section 1, The Domestic Legal Adviser. 18mo, 3s. 6d. half bound.

Paterson.—A Compendium of English and Scotch Law, stating their Differences ; with a Dictionary of Parallel Terms and Phrases. By J. Paterson, Esq., Barrister. Royal 8vo, 28s. cloth.

Practical Statutes for 1859. By W. Paterson, Esq., Barrister. 12mo, 7s. 6d. cloth ; 9s. half bound.

Railways.—A Collection of the Public General Acts for the Regulation of Railways, including the Companies' Lands and Railway Clauses Consolidation Acts; 1838, 1859, with General Index. Eighth Edition, 12mo, 6s. cloth.

Rowland.—A Manual of the English Constitution ; a Review of its Rise, Growth, and Present State. By D. Rowland. 12mo, 10s. 6d. cloth.

Smethurst. The Case of Thomas Smethurst ; his Trial, Sentence, Respite, and Pardon. By A. Newton. 12mo, 2s. 6d. cloth.

Smith.—A Treatise on the Law of Master and Servant ; including therein Masters and Workmen in every description of Trade and Occupation ; with an Appendix of Statutes. By C. M. Smith, Esq., Barrister. Second Edition, 8vo, 16s. cloth.

Tidswell and Littler.—The Practice and Evidence in Cases of Divorce and other Matrimonial Causes. By R. T. Tidswell, Esq., and R. D. M. Littler, Esq., Barristers. 12mo, 7s. 6d. cloth.

Tudor.—A Selection of Leading Cases on Mercantile and Maritime Law ; with Notes. By O. D. Tudor, Esq., Barrister. Royal 8vo, 34s. cloth.

Vaisey.—Lord St. Leonard's Act to further Amend the Law of Property, and to Relieve Trustees, 22 and 23 Vic. cap 35 ; with Notes. By J. S. Vaisey, Esq., Barrister. 12mo, 3s. 6d. cloth.

Williams.—Principles of the Law of Personal Property. By J. Williams, Esq., Barrister. Fourth Edition, 8vo, 16s. cloth.

THE
Law Magazine and Law Review:
OR,
QUARTERLY JOURNAL OF JURISPRUDENCE.

No. XVIII.

ART. I.—ARREST OF THE FIVE MEMBERS.

Arrest of the Five Members by Charles the First: a Chapter of English History re-written, by JOHN FORSTER. London: Murray, 1860. (Pp. 415.)

TWO hundred years have just elapsed since the Long Parliament, terminating an existence of twenty years, dissolved itself under universal contempt, and the opprobrious name of the Rump, by the coercion of General Monk, and since the restoration of Charles II., on the 29th May, 1660, re-established the Constitution by king, lords, and commons. The great party in the nation, which took their revenge on the Long Parliament by raising Charles I. to the rank of a martyr,—and which has annually, for nearly two centuries, “by prayer and fasting,” implored the mercy of God, “that the nation and its king might not again be delivered up into the hands of cruel and unreasonable men,” and “with prayer and thanksgiving” thanked Almighty God “for having put an end to the Great Rebellion, and for the restoration of the Government,”—at length became convinced (to use the words of the highest ecclesiastical authority) that “it was impossible, even if it were desirable, that we should entertain the feelings, and sympathize with the expressions, contained in these

state-services ;" and in the session of 1858, both houses of parliament, by unanimous addresses, prayed the Queen that those services should not only be discontinued, but should not be again printed and published in the common-prayer book. It might have been expected that the party-feelings which these state-services strove to perpetuate, would now disappear, and that the facts and circumstances which were their origin, would fall peaceably into the domain of impartial history. But whilst this graceful act of oblivion is performed by a great and triumphant party, there has arisen a champion of the Long Parliament, who, impressed by the study of its proceedings and its heroes, for which he is eminent, discards all moderate and conciliatory views, and seeks to awaken in modern breasts the contemptuous and disdainful feelings against Charles I., by which that famous parliament was animated, to represent its proceedings as not only just but necessary, and to brand the king and his supporters with folly and infamy.

We refer to the recent work of Mr. John Forster, "on the arrest of the five members by Charles I.," which is announced as a chapter of history re-written ; and its purpose to correct, by a true history, elicited from trustworthy and as yet unpublished contemporary records, Lord Clarendon's most elaborate, ingenious, and studied misrepresentation. A work which proposes to change the face of history, to overthrow in effect not only the perhaps too partial conclusions of Clarendon and Hume, but the calm and philosophic judgments of Hallam, is a challenge to all comers ; and we deem it within our province to consider Mr. Forster's new authorities, and his arguments, and the conclusions at which he has arrived. We shall probably uphold the views of our former guides, whilst we give to our readers our own on this interesting epoch of history ; but for that purpose we must introduce materials not found in Mr. Forster's book, which, whilst claiming to present new historical facts, is defective in the statement of the old. It is to point out his omissions, and to guard against conclusions derived from defective premises, that we address our readers. We shall, no more than Mr. Forster—and

perhaps even less than he—uphold principles at variance with genuine liberty ; but we shall make the constitution our guiding star, and, when we make any decisions, we shall endeavour to found them on principles of justice, and on historic truth.

We shall begin by considering the nature of the unpublished “contemporary records” which have been brought forward by Mr. Forster’s diligence. They are not records, in the ordinary sense of public documents—state, parliamentary, or legal ; they consist of private letters found, with one important exception, in the State Paper Office ; and, besides these, he has made use of an unpublished journal of Sir Simonds D’Ewes, a member and partisan of the Long Parliament, part of the Harleian MSS. in the British Museum.¹ The letters, existing still in manuscript, our author tells us, have not been before used in any of the histories. We shall find that he is mistaken in that assertion as to two of the letters ; and therefore it may be inferred that the others in the State Paper Office have been inspected and weighed, as elements of history, by at least one previous historian. The value of private letters as elements of history is not, however, very considerable, where the chief facts are preserved in public records ; nor can they safely be depended upon for facts not before known, unless considered as representations of the desires, prejudices, and feelings of the writers, and of the parties to which they were attached. The letters now introduced, written by persons of opposite sides in the great struggle to which they relate, frequently conflict ; but they do not contradict—indeed, they generally confirm—the historic facts derivable from evidence of a higher nature ; and thus the leading public events of this passage of history remain on their ancient basis.

We are not disposed to underrate the services of the Long Parliament. We acknowledge the public spirit, energy, and determination of its leading members ; and we adopt Mr.

¹ The Journal is not altogether unpublished. “Extracts from the MS. Journal of Sir S. D’Ewes, from the originals in the British Museum,” London, 1783, will be found in *Bibliotheca Topographica Britannica*, vol. 6. These, however, do not include Mr. Forster’s extracts.

Hallam's opinion, that "by their salutary restrictions and new retrenchments of pernicious or absurd prerogative, the Long Parliament formed our constitution such nearly as it now exists." Hume, also, has the candour to admit—indeed, no one can reasonably deny—its eminent services, "during the *first* period of its operation, when their merits so much outweigh their mistakes as to entitle them to praise from all lovers of liberty." But we do not believe in any theories of history based on angelic virtue in one party, and unmitigated wickedness in the other; which, we think, we do no injustice to our author in stating to be the theory of his book. It is at that part of the career of the Long Parliament which our author takes up, that we think its proceedings became questionable. It had achieved a great victory over the king, both by the enactment of important laws curtailing his prerogative, and by the execution, banishment, or imprisonment of his most eminent ministers and adherents. The spirit of Charles was humbled, and his high notions of prerogative reduced. His speeches to parliament evince that change. But neither that change, nor the important circumstances which produced it, are adverted to by our author. He would, we think, have assisted his readers, and perhaps tempered his own judgment, in estimating the value of his new authorities, and of his arguments and conclusions, if he had commenced his history with some account of the political position of the two great parties in contest, the king and the parliament, as it existed at the time of the attempted arrest; for we cannot justly estimate the actions of men, nor fairly bestow on them either praise or blame, unless we know the circumstances under which they acted, from which we may endeavour to ascertain the motives of their conduct.

This passage of history occurred after great reductions had been made in the royal power. The Long Parliament had induced or compelled the king to give his assent to acts which reduced the royal authority to almost its present constitutional limits. Triennial parliaments were established, independent of the power of the crown to prevent their assembling; the Star Chamber and

High Commission Courts were abolished ; the judges were declared to hold their offices *quamdium bene se gesserint* ; ship-money was declared illegal ; the power of enlarging forests and compelling knighthood was taken away ; and Charles yielded up one of his most cherished points of contention with his early parliaments—his claim to tonnage and poundage for his life ; a grant which had been made by parliament to every preceding sovereign since the reign of Richard II., and the withholding of which by the parliament had more to do with Charles's unconstitutional proceedings than is generally understood. For this surrender, which placed the power of the purse in their hands, they substituted grants of tonnage and poundage for weeks or months ; whilst we have Mr. Pym's authority that, even at the commencement of Charles's reign, the revenues of the crown were so alienated, anticipated, and overcharged, that no means were left but the voluntary and free gifts of the subjects in parliament.¹ On the other hand, the parliament obtained a large accession of power, from the surrender by the king of one of the most important and indisputable of his constitutional prerogatives—no less than a law that the parliament should not be dissolved, nor prorogued, nor adjourned, unless by a statute to be passed for that purpose ; and that neither the House of Peers nor the House of Commons should be adjourned, unless by themselves or their own order. By that act, observes Lord Campbell with emphatic truth, "Charles was virtually dethroned."² It deprived him of the most important means which the crown possesses of influencing the parliament to a course of action consistent with the just authority of the king ; it deprived him, also, of defence against its aggressions. It is no exaggeration to say, that this statute was the primary cause of the civil war. The commons had nothing more to do than to undermine the executive power vested by the constitution in the king, and to absorb it into their own body, in order to have the whole supreme power of the state in their hands. From this time we shall find that all their pro-

¹ Parliamentary and Constitutional History, vol. viii. p. 175.

² 16 Car. 1, Cap. 7 ; Lives of the Chancellors, vol. iii. p. 284.

ceedings tended to that object, and to bring upon the king popular odium and contempt.

It is one of our author's positions that the arrest of the five members was planned by Charles during his absence in Scotland. Although that rests only on opinion, we think that, in order to estimate justly the conduct of the parties, the chain of events, of which the attempted arrest was part, should be traced as far back as the king's departure for Scotland. He left home in August 1641, immediately after giving the royal assent to some of the acts before described, restrictive of his prerogative. His special business was to arrange disputes which had led to war between the two kingdoms, and to disband their respective armies. In his absence the parliament adjourned from the 9th of September to the 20th October; but they appointed committees of both Houses to sit during the adjournment, with instructions that made some encroachment on the executive duties. When parliament reassembled Charles had not completed his affairs in Scotland, and he was unable to attend. In his absence the Commons, on the 25th October, appointed a committee to prepare a petition to be presented to him, to prevent the mischief that might happen to the commonwealth by the choice and employment of evil councillors, ambassadors, judges, and other ministers of state. From that germ, on the 10th November, they were engaged in producing a declaration or remonstrance of the state of the kingdom. That continued to be their chief business from the 18th to the 21st; when it was so far agreed to as to be ordered to be engrossed, and to be taken into consideration by the whole House on the 22nd of the same month. On that day, after a debate which lasted from three o'clock in the afternoon until three o'clock on the following morning, and after four divisions, in which amendments were contested, it was passed as amended by 159 votes against 148. These facts, recorded in the journals of the House of Commons, are the subject of the earliest letters introduced by our author; but he has omitted to notice the important fact, that on the question whether the word *published* should stand in the

order for not printing the remonstrance, the Noes were 124, against Yeas 101 ; nor that it was resolved upon the question, that it should not be printed without the particular order of the House. These divisions afford irrefragable proof that the king had a numerous party in the House by whom the remonstrance was disapproved.

On the 25th November the king returned from Scotland, "eager," our author informs us, "that the terrible record of his past misgovernment should not be presented to him." He made a public entry into London. The pages of Rushworth and Nalson describe the royal procession, the proceedings of the corporation, the speeches of the recorder, and the pomp and circumstance of the city banquet. Our author would diminish the credit of the royal reception, by attributing it "to the accident of a royalist lord mayor." But several letters he has introduced describe the reception as warm and magnificent. Later letters express hopes that the friends of the king may not have flattered themselves with an imaginary strength and party in the city. A great event had, however, intervened between the earlier and later letters. On the 1st of December a committee of the Commons made their contribution of loyalty and welcome to the king, on his return, by presenting to him at Hampton Court a petition with the remonstrance annexed to it. The king, it was reported to the House, graciously received the commissioners, not permitting them to kneel. He asked them if the House intended to publish the remonstrance ; and they not being prepared to give a reply, he promised an answer to the business with as much speed as its weightiness would permit. He afterwards sent a message to the House by Mr. Comptroller, that there might be no publishing of the declaration until the House had received his majesty's answer.

The Commons did not, however, respect the royal message ; they probably considered that they had waited long enough, when on the 15th December, the king's answer not having arrived, they passed a vote for printing the remonstrance, by a majority of 135 against 83—a division showing a proportionate increase

of the puritan, and diminution of the royal, supporters in the House. A letter refers to the conflict of parties in both Houses. "Never was there more heat in both Houses than at present. God send them better at unity, whereby we may enjoy fairer hopes of peace and tranquillity, and the king to shine out with as much brightness and splendour as heretofore he hath done." "A hope, alas!" remarks our author, "with small chance of realization after the vote of the 15th December, by which the remonstrance was placed in the hands of the people."

The placing of the remonstrance in the hands of the people was, we believe, a proceeding unprecedented in the annals of parliament. Remonstrances were introduced by the parliaments of James, and had been used by the parliaments of Charles, generally as assertions of privileges and rights disputed by the Crown, and occasionally directed against taxes, arbitrarily imposed without consent of parliament. The most memorable of these is the protestation of the House of Commons in 1621, which James afterwards tore from their journals with his own hands. But that was not a remonstrance against the government of the king, but an assertion of parliamentary privileges and rights. None of these were printed and published as appeals to the people; and the proposal to print the grand remonstrance accordingly met with great opposition. A letter informs us that it was hotly debated "whether the remonstrance should be printed, and that about a hundred did protest against it, with a caution if it were contrary to the orders of the House, and desired their names to be printed with the remonstrance; that caution was to avoid the penalty of Mr. Palmer, who was committed for protesting against it." These circumstances and the committal of Mr. Palmer, who made the first protest, will be found in the journals, and are given in detail by Lord Clarendon, who, as Mr. Hyde, takes the credit to himself of making a protest before Mr. Palmer. Mr. Forster "descants on the monstrous assumption of a right in the minority to enter a formal protest against the series of votes it had itself been successively outvoted in resisting;" and deduces from the conflict, "that the object on

one side was to uphold, and on the other to overthrow, the legitimate action of the House of Commons." He has not considered whether that House had a legitimate right to address the people against their king, by presenting him with a document described as "a terrible record of his past misgovernment," and that even without the concurrence of the Upper House. No such power is claimed by the House of Commons in modern times. It would be subversive of constitutional government. Either House may address the Crown, and point out its disapproval of the acts, policy, or advice of the king's ministers. It may recommend specific acts, or a particular course of policy. So either House may pass resolutions designed to express its opinion for the guidance of the Crown, with regard to the expediency or in expediency of any particular acts or policy. But the name of the king must not be mentioned in any debate, nor the acts or policy attributed to his personal misgovernment. An appeal to the people by a declaration or remonstrance not addressed to the king, but in which he is spoken of as a third person, which reviews all his acts and proceedings from his accession to its date, with the purpose of denouncing his personal conduct, and of elevating by comparison with it the conduct of the House of Commons; which, with the like comparison, strives to show the advantages which the people have obtained through their instrumentality; and still more, the setting forth of their own intentions for the future, and pointing out the members of the Upper House, the bishops and so-called recusant lords, as crossing and interrupting the Commons' best endeavours for reformation—is not merely unconstitutional but revolutionary, and could only have been intended, by exciting the people against the king, to diminish his power, and increase that of the Commons.¹

Mr. Forster has held up the grand remonstrance to the admi-

¹ The grand remonstrance, with the petition, and the king's answer, and counter-declaration, will be found in Rushworth, Nalson, Rapin, and in the two Parliamentary histories. It is epitomized in Clarendon's "History," and Rowland's "Manual of the English Constitution." These works, with that of Mr. Hallam, are the authorities on which this paper is written.

ration of his countrymen in a separate work. We are spared the necessity of proving that it was a personal attack on the king, by the expressive phrase, before quoted, in which he has embodied his opinion of it. We may confirm his opinion, however, and support our own views, by a speech made in parliament during the debate on the remonstrance. Sir Edward Dering, member for Kent, on whose credibility our author relies for an important fact introduced into history for the first time (to which we shall presently refer), spoke and voted against the remonstrance, and his speech has been preserved and printed. In prophetic words he said that "this remonstrance, whensoever it passeth, will make such an impression, and leave such a character behind, both of his majesty, the people, the parliament, and of this present Church and State, as no time shall ever eat out whilst histories are written, and men have eyes to read them. How curious, then, ought we to be, both in the matter and the form. . . The matter, form, and final end of this remonstrance, all of them do argue with me, not to remonstrate thus. When I first heard of a remonstrance, I presently imagined that, like faithful councillors, we should hold up a glass to his majesty; I did not dream we should remonstrate downwards, tell stories to the people, and talk of the king as of a third person. The use and end of such a remonstrance, I understand not; at least I hope I do not." He then proceeds to the religious grievances recited in the declaration, indicates several of the bishops and clergy by name, and concludes—"Thus, I have done; and because I shall want champions for true religion; because I neither look for cure of our complaints from the common people, nor desire to be cured by them; because this House (as, under favour, I conceive) hath not recommended all the heads of this remonstrance to the committee which brought it in; because it is not true that the bishops have commanded idolatry; because I do not know any necessary good end and use of this declaration, but do fear a bad one; and because we pass his majesty, and do remonstrate to the people; I do here discharge my vote, with a clear conscience, and must say *no* to this strange remonstrance."¹

¹ Parl. & Const. Hist.—vol. 10, p. 45—speech printed in 1641.

The highest praise of an historian is, that he has executed his work with judicial severity. If we would pay that compliment to our author, we must take our standard from those famous judges in the State trials, who not only decide every point against the prisoner, but also interlard their decisions with interjectional sarcasm and abuse: a part he has performed by the notes with which the margins of his book are crowded. Under chapters, headed "False Reliances," and "Fatal Mistakes," the events antecedent to the attempted arrest are reviewed; and it is remarked that "Charles continued to act as if his imaginary strength were solid and eternal. On any other assumption we should have to characterize as those of a madman the series of acts from the opening of December to Christmas eve"—the marginal note attributing these acts to the "foolhardiness of the king." The proceedings of that period are, it must be admitted, very important in the consideration of the causes which led to the attempted arrest; for, on the 2nd of December, the king made his first speech to the parliament after his return from Scotland, and on the following 3rd January articles of impeachment were presented to the House of Lords against Lord Kimbolton and the five members of the Commons. We are mistaken, however, in our estimate of the proceedings of that interval, if Charles can be considered as the primary actor. We rather think it may be made apparent that he acted upon the defensive, and that during that interval a series of attacks was made upon him, with the view of bringing him under public odium, and gradually absorbing the executive power into the hands of the parliament.

On the 3rd December the king attended at the House of Lords, the first time after his return from Scotland. He gave the royal assent to an act which granted him tonnage and poundage for the few weeks ending on the following 1st of February. If, as Mr. Hallam has conjectured, "the promoters of the remonstrance might hope, from Charles's proud and hasty temper, that he would reply in such a tone as would more exasperate the Commons," we may be surprised at the courtesy and gentleness of his speech delivered only two days after receiving the remon-

strance. Not having sent his answer to the remonstrance, he does not allude to it ; but begins by thinking it fit, after so long an absence, to speak a few words to them. He referred to his long stay in Scotland against his will, but he had had good success in the settlement of the Scots affairs, and he had left the nation a most peaceable and contented people. " But " (he proceeded) " if I have deceived your expectations a little in the time of my return, yet I am assured that my expectation is much and more deceived in the condition wherein I hoped to have found businesses at my return : for since that, before my going, I settled the liberties of my subjects, and gave the laws a free and orderly course, I expected to have found my people reaping the fruits of these benefits, by living in quietness and satisfaction of mind. But, instead of this, I find men distracted with jealousies, frights, and alarms of dangerous designs and plots, in consequence of which guards have been set to defend both Houses. I say not this as in doubt that my subjects' affections are any way lessened to me in this time of my absence (for I cannot but remember the joyful reception I had now at my entry into London) ; but rather, as I hope, that my presence will easily disperse these fears ; for I bring as perfect and true affections to my people as ever prince did, or as good subjects can possibly desire ; and I am so far from repenting me of any act I have done this session for the good of my people, that I protest, if it were to do again, I would do it ; and will yet grant what else can be justly desired for satisfaction in point of liberties, or in maintenance of the true religion as here established." He calls their attention to preparations for suppressing the rebellion that had broken out in Ireland, and for that purpose asks that both Houses would appoint a select committee to meet two lords who had arrived as commissioners from Scotland ; and ends by saying, " I must conclude in telling you that I seek my people's happiness ; for their flourishing is my greatest glory, and their affections my greatest strength."

It is a favourite notion of our author, that Charles deceived himself as to the real state of public feeling ; and there is

brought forward a letter from Mr. Speaker Lenthall to Mr. Secretary Nicholas, described as "perhaps the most striking indication of all that now tended, for the time, completely to deceive the credulous king." This letter, which is cited MS., State Paper Office, is dated 3rd December, 1641. It desires the secretary's interference with the king to obtain permission for the Speaker, "wearied out for his services, to return to private life, whilst he has ability of body left to endeavour to do that without which he could not but expect ruin and a badge of extreme poverty on his children." From this, "the king, willing to be duped," it is inferred, "came to the belief that his enemies in the House of Commons were falling asunder; and Charles clutched at it, and desperately held to it, with the impulsive weakness of his nature." But Speaker Lenthall had second thoughts, and another string to his bow; and in a note, a page or two afterwards, we have another letter, without date, also MS. from the State Paper Office, in which the Speaker begs the secretary, "if the other way do not take, to find occasion to incline his majesty to recommend him to the consideration of the House, by which means he may hope of some satisfaction." If it were worth while seriously to bandy such inferences as historical, we might infer that the king must have had reason to change his opinion as to the fate of his enemies, when the second letter arrived announcing that Speaker Lenthall was willing to stay in his place if duly compensated. How puzzled the king must have been, and how depressed the secretary, from that state of "exultation with which (it is imagined) he must have submitted the first letter to his master!" But what if the second letter was enclosed in the first, and both arrived at the same time? We are sorry to take away the foundation on which our author has raised such a pretty tale of imaginary history. But that is the statement of no less a person than John Nalson, LL.D., who wrote in the reign of Charles II., and who tells us that he found these two letters in the State Paper Office, and that one was enclosed in the other, and they are printed in his work. It is amusing to read the reflections or

authors writing from the opposite poles of opinion. Mr. Forster apostrophises Lenthall as though "a weak and commonplace man, so soon to be for ever associated in history with an apparently high-spirited assertion in his own person, of the privilege and independence of the House of Commons;" whilst Nalson observes, "that had he had the good fortune to quit that seat, he might have escaped the brand of infamy which to the world's end will lie on his name."

Our author proceeds to accumulate charges against the king. He accuses him of "rashly issuing a proclamation to enforce the statutes against impugning the common prayer, immediately after receiving a petition from the city against the bishops." The petition which he received from the city, was "the petition of the apprentices, and those whose apprenticeships were lately expired. They desired his majesty in parliament to take notice, that, notwithstanding the much unwearied pain and industry of the House of Commons to subdue popery and popish innovators, such as archbishops, bishops, and their dependants appeared to be, neither was popery yet subdued, nor were prelates yet removed; and they desired that the laws against priests and jesuits should be fully executed, and the prelacy rooted up, for the quieting of the distracting fears the petitioners entertained of great mischief coming upon them, to nip them in the bud when they were first entering into the world." Charles afterwards caused a proclamation to be published, probably intended to rebuke the extravagance of the apprentices' petition, in which he commanded that divine service be performed as appointed by the laws and statutes, and that obedience be given by all his subjects, ecclesiastical and temporal, to such laws.

The king is next charged with "the inconceivable folly of respiting the operation of the law in favour of certain Roman Catholic priests who had incurred the wrath of the Commons, and fallen under the sentence of the courts, and whose lives were justly forfeit." It is startling to find a liberal historian describing the lives of priests of a proscribed religion as justly forfeited, whether by the barbarous law that then existed, or for

having incurred the wrath of the House of Commons ; but there is connected with this a further charge against the king, "that several men condemned to death at the same sessions for common offences, were executed, whilst the priests were respited." This charge is made on the authority of a manuscript letter in the State Paper Office, dated 16th December, 1641, to which is added, in a note, the observation by our author, that "Clarendon has not noticed this remarkable incident, nor is it mentioned in any of the histories." That circumstance might have occasioned some suspicion of the truth of the statement. But although of the men condemned at the same sessions with the priests, history tells us nothing, our author aggravates the charge against the king, by assuming that they were "condemned for common offences, held then to be comparatively venial," his quoted letter giving no authority for these extenuating expressions, but simply stating "crimes." It does appear in the journals of the House of Commons, that on the 8th December a message sent by the king to the Lords on the previous day was reported to the House, "that the French ambassador had moved his majesty that he would be pleased to grant his favour to the eight priests that were condemned or to be condemned that day, either to banish them or to imprison them, and that it would be advantageous to the affairs in Ireland"—meaning that the papist rebels might retaliate on protestant prisoners in their hands ;—"that his majesty had announced that he would acquaint his parliament with his request, and would have their advice." The king repeated his message on the 11th, "informing the Houses that since the last message seven of the priests had been convicted, and the day of the execution was on Monday next." The House of Commons passed several votes on the subject, by which some of the priests were ordered to be executed, and others spared ; but finally, on the 31st December, they sent a message to the Lords to join to move the king for the execution of all the priests. It is clear from the journals, that the king left the fate of the priests in the hands of the Commons, who, influenced by some circumstances

that do not appear, came to contradictory decisions by their votes. Mr. Hallam notices this affair, and he gives Charles the credit of "dexterously leaving it to the Commons whether the priests should die or not."

Another charge against the king is, that "he had assailed the privileges of the House of Commons, by an intemperate message of disapproval, during the discussion of a bill for raising soldiers by impressment." If this passage be read by one unacquainted with the circumstances, he must wonder why Charles is censured for a disapproval so honourable to his liberality; but there was no such disapproval, nor any other disapproval whatever. The facts are, shortly, that the bill was introduced with a preamble which impugned the prerogative of the crown to press soldiers, as it then existed, and as it existed and has been practically exercised with respect to sailors, during the present century. That led to much debating and much delay; and Charles went to the House of Lords, where, mentioning his great anxiety for the passing of the act, on account of the lamentable state of his Protestant subjects in Ireland, for whose protection the soldiers were intended, he proposed to waive the question of prerogative until a future time, and would consent to the bill passing with a clause saving his right, or, as he called it, a *salvo jure*. The Lords and Commons united in a remonstrance against that interposition, in which the only memorable thing is, that it contains the first instance of that demand, afterwards so often made, offensive to the feelings of an honourable man, "that he would declare the names of the persons by whose misinformation and evil counsel he was induced to the same, that they might receive condign punishment." Charles replied, "that it was not wonderful he should get the information, for the bill was in print when he came to the House; yet, if he had got notice otherwise, it were a thing much beneath him to name any that should give him information and counsel, it being that which he did not impose upon any person of honour."

The king, during the pendency of the last-described dispute, sent to the Commons an answer to their petition and remonstrance; and his answer was printed and published by his orders.

It stated that he had received a long petition, consisting of many desires of great moment, together with a declaration of a very unusual nature annexed thereto—that he had taken time to consider of it, as befitted a matter of that consequence, confident that his express intimation by his comptroller would have restrained them from publishing their remonstrance till they had received his answer; but, much against his expectation, finding it abroad in print, he must let them know he was very sensible of that disrespect. But no failing on their part should make him fail on his, of giving all due satisfaction to the desires of his people in a parliamentary way; and therefore he sent an answer to the petition, reserving himself in point of the declaration, which he thought unparliamentary, and should take a course to do that which he should think fit in prudence and honour. He then addressed himself to the chief points of the petition—the existence of a malignant party, the depriving of the bishops of their votes, corruptions in church government, for the removal of which he would, if parliament advised, call a national synod; and the removal of evil counsellors, as to whom, although he knew of none, he would ever be careful to make election of persons of ability and integrity, against whom there could be no exception.

Another charge against the king is his conduct in a dispute between him and the Earl of Newport, which, although a private matter, was made the ground of a petition from both Houses of Parliament. Whilst the king was in Scotland, the queen was informed that at a meeting at Kensington, where several members of parliament were present, a discourse arose respecting a plot, in which the king was concerned, in Scotland, when the earl remarked, “if there be such a plot, yet here are his wife and children,” which was interpreted to recommend the seizing of the queen and royal family. The queen having been informed of this conversation, the earl waited on her, and assured her she was misinformed. The king, on his return, inquired of the earl whether he had heard any debate at Kensington about seizing the queen and her children, which the earl denying, the king

repeated his question, with the caution that "You can tell me nothing more than I know already, therefore consider well what you answer." Lord Newport again denying, the king replied, "I am sorry for your lordship's memory." The parliament took up this private dispute, and, assuming every thing in favour of Lord Newport, they sent the king a petition, "that he would declare who was the reporter of the words pretended to be spoken by Lord Newport, and that he would move the queen to discover who acquainted her therewith." The king, in his answer, denied the inference which Lord Newport had drawn from the conversation between them. He said it was true he had heard the rumours referred to, and in things of so high a nature it might be fit for any prince to inquire, even where he had no belief or persuasion of the thing; so he had asked Newport some questions concerning that business, but far from the way of expressing a belief of the thing which Newport had had the confidence and boldness to affirm. "But let this suffice," he added, "I assure you that I neither did nor do give credit to such rumour. As for telling the name of him who informed me, I do stick to the answer that I gave to the last petition upon the like particular." Our author characterises the king's language to Lord Newport as insulting; whilst his marginal notes thunder out, "The lie given to Lord Newport."—"The lie retracted."

Mr. Forster devotes much more space than we can afford to the affair of the change made by the king in the appointment of lieutenant of the Tower, and to the tumults which arose around the Houses of Parliament at Westminster; but, whilst he is loud in his censures of the king for the change in the Tower, he nowhere considers the conduct of the Commons, with reference to the king's constitutional prerogative, as depositary of the executive power. Nor does he explain the conduct of the Lords in the affair, which is a justification of the king. The Commons represented to the Lords that they had received information that Sir William Balfour, lieutenant of the Tower, approved for his fidelity, was removed from his place, and one Colonel Lunsford substituted, a man very unfit to be

trusted with a post of that importance. That information was founded on a petition from divers common councilmen of the city, to which the Commons added reasons of their own, from which we shall supply one that our author has omitted, although, probably, it is that which was considered the gravest of all—"that the Commons were informed that Colonel Lunsford was not right in his religion; for they understood when he was commander in the north, in the king's army, he did not go to church, though he was desired:" in less circumlocution, that he was a papist. The Lords refused to join in any petition to the king, asserting the true constitutional doctrine, that the placing or displacing of the king's officers was a branch of his prerogative; the Commons therefore "resolved, *nam. con.*, that Colonel Lunsford was unfit to be or continue lieutenant of the Tower, as being a person whom the Commons could not confide in;" and another conference was held between the Lords and Commons, in which the "Commons took it much to heart that their Lordships would not join with them to petition his majesty;" and they drew up a declaration for themselves expressing their own views, and exonerating themselves "from all consequences which should arise from the neglect of their recommendations; and that they were innocent of the blood which was like to be spilt, and of the confusion which would arise if that person be continued in his charge, from the cruelty and rage of the papists." The Lords, after the reading of the declaration, adjourned the debate, twenty-two peers protesting against the adjournment. Before the debate was resumed the king yielded to the clamour, removed Colonel Lunsford, and appointed Sir John Byron in his room; and we must give our author the credit of a discovery he claims to have made, one of the letters giving the fact, now for the first time published, "that the king made Lunsford a knight, and, as the writer was told, gave him £500 a-year pension." We may add that the Commons also rewarded him, by placing him in custody as a delinquent.

The tumults at Westminster during the Christmas holidays, Mr. Forster states, arose from popular discontent at Lunsford's

appointment, and the bloodshed that ensued was exclusively the act of the king's friends and dependants. The evidence of the letters speaks of the 'prentices, on their return from demanding an answer to their petition to the Parliament House, having some bickerings with the soldiers, in which many of the former were wounded, and lost their hats and cloaks. The wounds of the 'prentices, it is added, so exasperated them, that it was feared they would be at Whitehall to the number of ten thousand, and the soldiers were increased in numbers. Another letter describes the people as continuing their insolencies (an expression which our author censures when applied by Clarendon to the people), and meeting Lunsford at Westminster they fell to blows, in which disorder divers were lightly hurt (bloodshed according to the marginal note), but without further danger; and one of their chief leaders, Sir Richard Wiseman, was also hurt. But the conduct of the citizens and apprentices, "irritating, doubtless, as all crowds are," is excused when the bishops were assaulted, as "creating no mischief worse than a crumpled cloak or a torn gown, an impertinent word, or an inconvenient hustling and pressure." Evidence is, however, cited that Mr. Bramston, son of the chief justice, saw the Bishop of Lincoln's gown torn as he passed from the stair-head into the entry that leads to the House of Lords. But "those troublesome citizen quidnuncs, those idle varlet apprentices," had great provocation in the appointment of Lunsford, and receive these mitigatory appellations, whilst their opponents are "fierce soldier adventurers, not only men of completely desperate fortune, but all of them under the ban of the majority of the House of Commons;" and the king is censured as "causing the needless shedding of the blood of his subjects, for accepting the offices of various bodies of men as his guards." We shall not be expected to think it any disgrace to the king, but rather a proof that his conduct on this occasion was uncensurable, when we find from one of the letters that five hundred gentlemen of the Inns of Court came one day to offer him their services; that learned body showing then the loyalty and martial spirit for which they are conspicuous at the present day.

The worst result of the tumults, in which, although there were many hard knocks and some wounds, there does not appear to have been life lost, or any blood shed beyond light hurts, fell on the bishops. We have seen that one of them had his gown torn as he was entering the House of Lords; and it cannot be denied that they were special objects of the riotous assaults, although our author ridicules their alarm and desire for protection, as arising from groundless fears. The bishops presented a petition to the king and peers, in which they declared "that they had been at several times violently menaced, affronted, and assaulted by multitudes, in coming to perform their service in the House of Lords, and lately chased away and put in danger of their lives, and could find no redress or protection upon sundry complaints made to both Houses. They protested that they dared not sit or vote in that House until his majesty should secure them from all affronts, indignities, and dangers; and further protested against all laws, orders, votes, resolutions, and determinations passed in their absence, as null, void, and of none effect, "not denying (they add, but which our author omits) but if their absenting of themselves were wilful and voluntary, the House might proceed in all these premises, their absence or that protestation notwithstanding." The latter clause appears to us to have entitled the bishops to an inquiry whether their absence was wilful and voluntary, for they made their protestation depend upon that fact; but both Lords and Commons eagerly seized the opportunity of impeaching the bishops, and in a few hours these aged and venerable men, accused of endeavouring to subvert the fundamental laws of the realm, and the very being of parliaments, but declaring that they had no malicious or treasonable intentions, were incarcerated in prison. Our author describes, with evident satisfaction, the entry of Williams, archbishop of York, leading with him nine other right reverend prisoners, out of the twelve accused, into the Tower; where Laud, archbishop of Canterbury, was confined; and he imagines the mirth which Laud enjoyed on finding his ancient adversary in the same toils—"that ray of mirth which was

probably the last that glimmered feebly upon him between Stafford's scaffold and his own."

We have answered, with perhaps too great encroachment on our limited space, the series of accusations of the month of December; and we now ask whether our author has been just in opening his description of them, by characterising them as the acts of a madman or a fool? Were they acts that originated with Charles, or was his conduct in regard to them more than defensive? Do we not perceive the parliament gradually absorbing into itself the executive authority, and all its policy and efforts directed to that object, to end in that most despotic of all tyrannies—a democratic assembly, indissoluble, wielding both the legislative and executive powers of government? We marvel that a gentleman who, we understand, has devoted his life, as a public writer, to the dissemination of liberty on the broadest principles, should see no danger to liberty in the proceedings of the Long Parliament at this epoch, but should bestow upon it all the commendations which his ingenious and able pen can devise.

We approach now the great event which is the special subject of the work under review, and we must endeavour to trace the immediate antecedents affecting the future conduct of Charles. His regal and executive authority was almost gone, and the parliament was struggling for the last remnant of his strength—the appointment of officers to the command of the militia, and the custody of the Tower, and of the ports and magazines of the kingdom. They retained the power of the purse in their own hands, passing acts for tonnage and poundage for periods of only a few weeks. He had no ministers of any ability or faithfulness in the House of Commons, as Clarendon informs us—Sir Thomas Jermyn, on whom he might have depended, having retired into the country; and Sir Harry Vane, the other privy-councillor, having given himself entirely to the disposition of the Commons; whilst Saint-John, the solicitor-general, was a man wholly devoted to them and their principles, and in their confidence. At this juncture, and under these circum-

stances, he attracted to his counsels Lord Falkland, as secretary of state, and Sir John Colepepper, member for Kent, as chancellor of the exchequer, and he had been promised the services of Mr. Hyde, without any office as minister. We cannot conceive any course more likely to have been beneficial to the king and to the country, than his placing himself under the guidance of such men ; but it must have been seen that their power was very insignificant in a contest with a parliament so determined, so uncompromising, so unjust—indissoluble except by their own act—unless the leaders of the majority could be induced to take office. It now appears, from evidence furnished by our author, and which we consider to be a new and important fact contributed to history, that an offer of the office of chancellor of the exchequer was made to Mr. Pym, before Sir John Colepepper was appointed. This interesting fact was not derived from the letters in the State Paper Office, but from a private letter communicated to our author, written by Sir John Dering, early in January 1641-2, to Lady Dering, his wife, in which he tells her:—"The king is too flexible and too good-natured ; for within two hours, and a great deal less, before he made Culpepper chancellor of the exchequer, he had sent a messenger to bring Pym unto him, and would have given him the place."

The great puritan leader, if it be true that the offer was made to him and he declined it, lost, as we think, a great opportunity of serving his country, by preserving the monarchy on a constitutional basis, and of establishing for himself a fame, not less perishable perhaps than that he has acquired, but more generally acknowledged as worthily obtained. Nor on his principles should he have refused, because it is one of the main charges of the grand remonstrance that the king placed himself under the influence of evil councillors. In the previous November, whilst the king was in Scotland, Pym addressed the House of Commons concerning ill councils, which he attributed to a spirit and inclination to popery. "That was the proper time," he said, "to desire his majesty for an alteration and change, which would be an

advantage to the king, and a great encouragement to his good subjects at home, and make them fitter to enter into union and treaty with foreign nations and states." If, whilst these advantages were in his power, he refused to be the medium of realizing them, his refusal must be attributed to his entertaining designs inconsistent with the preservation of the monarchy and constitution.

Mr. Forster observes, that acceptance of office would have been Pym's ruin. He must mean that it would have ruined his influence with the Commons, and the party of which he was the leader; it would most certainly have obliged him to have observed a course of conduct and policy very different from that which the parliament had pursued. Pym doubtless foresaw that the monarchy was rapidly sinking, and that the House of Lords could not long survive it. To a committee of that House, in conference, he had lately, on instructions given to him by the Commons, required the submission of the Upper House; "that the House of Commons being the representative body, and their Lordships as particular persons, and coming to parliament in a particular capacity, if they should not be pleased to consent to the passing of certain acts then before them, and others necessary for the preservation of the kingdom, that the House of Commons, with such lords as were sensible of the safety of the kingdom, might join together and represent the same to his majesty." The terminating threat was a mere figure of speech. The whole address shews that Pym and the leaders of the parliament no more respected the constitutional authority of the House of Lords than they did that of the king. We may contrast the refusal of Pym with the acceptance of office by, and patriotism of Falkland; although (Clarendon observes) "no man could be more surprised than he was when the first intimation was made to him of the king's purpose; he had never proposed any such thing to himself, nor had any veneration for the court, but only such loyalty to the king as the law required from him."

Charles is entitled to the credit of having offered office to the puritan leader, as it proves that he was willing to place himself

under the sternest control against interference with past measures; but the offer also proves his desponding condition, for men do not, until they despair of other means, capitulate with their enemies, or submit to their control. Pym's refusal must have raised a serious question in the mind of Charles as to what course he should take to contend against a parliament gradually enclosing him within its grasp. He had hardly a move in the game, nor could he hope to retain the small remnant of his royal authority that remained, through his new ministers, whilst the House of Commons retained their majority. He had parted with the only constitutional power that would now have availed him—the power of dissolving parliament. We think that historians have not sufficiently considered the consequences of the absence of that power at this juncture; and our author makes not the remotest allusion either to its surrender or its absence. If Charles could have dissolved the parliament, he might have despatched his enemies at one stroke. It is true that a new election might reinstate them; and it is not probable that the return of the puritan leaders could have been prevented. But many of their supporters might not have been re-elected, and the puritan majority might have been lost. The peers, by a dissolution, would have recovered their independence and their influence in their counties; and the large body of country gentlemen who were supporters of Charles, and who rallied round him when the civil war actually commenced, might have effected a great change in a new House of Commons. If a successful election could not be calculated upon immediately, it might have been deferred, by the new law, for any period not exceeding three years; and thus time would have been obtained for the recovery of confidence, and the removal of the unpopularity which the puritan party had fastened on the king. As it was, there seemed nothing open to the king but the removal of the puritan leaders by some means. It was a policy not new to Charles. He dissolved his third parliament to get rid of the leaders, stating, in his speech to the Lords by which he dissolved the parliament, "that he did not lay the fault equally upon all the Lower

House ; for as he knew there were many dutiful and loyal subjects there, so he knew it was only some vipers amongst them that had cast that mist of difference before their eyes."

Our author has tried to fix on the new ministers Falkland and Colepepper, and more especially on Hyde, privy, if not assent to the impeachment of the members ; but he has supported his views by no new fact, nor by any reasoning that we think conclusive ; and we adhere to Clarendon's declaration, that the step was taken without their knowledge. It is not probable that men so experienced would have advised or permitted, if they had known of it, a proceeding which was illegal ; for although it was afterwards attempted to be justified, on the ground that there was no protection from parliamentary privilege in cases of treason, it is only through a grand jury that the Crown can prosecute for treason ; and the House of Lords cannot try commoners unless they are impeached by the House of Commons as the grand inquest of the nation. But these legal distinctions were probably not understood by the inexperienced persons to whom Charles seems to have committed the preparation of the articles of impeachment. The attorney-general, Herbert, although he presented the articles to the House of Lords, declared, when examined by the Commons, that he neither framed, advised, nor contrived the articles—he received them from the hands of the king. But if it were supposed that the Lords, as soon as the articles were presented, would sequester Lord Kimbolton and the five members of the Commons from parliament, and imprison them, the expectation was not unreasonable ; for we have seen with what alacrity they incarcerated the bishops ; and history shows how readily in the Long Parliament, on the many other occasions when articles of impeachment were presented to them, the Lords complied with the requisitions of the Commons, by imprisoning the accused.

We have not space nor is it necessary to follow our author through his narrative of the impeachment and attempted arrest. It presents no novelty in the leading facts, although he has illustrated them by extracts from the letters, and from the journals

of Sir Symond D'Ewes. He seeks to represent the conduct of the king as tyrannical and odious. The attempt to arrest by Charles in person, was probably not a part of the original plan. It was resolved upon after the failure of the proceeding in the House of Lords, and the refusal of the House of Commons to deliver up the accused members to the king's serjeant-at-arms. We must admit that the attempted arrest by the king in person was not only unjustifiable as an invasion of the privileges of the Commons, but illegal as an attempt to arrest without any legal charge or warrant. It can only be considered as a *coup d'état*; its parallel in English history is the dismissal of the same Long Parliament by Cromwell when he entered the House of Commons with armed musketeers, and, lifting up the speaker's mace, desired a soldier "to take away that bauble." Cromwell's *coup d'état* was successful, and it has been rewarded by the admiration of historians. That of Charles was unsuccessful; and those who have written adversely to him, have bestowed upon him every variety of abuse and calumny. But Charles had not the power possessed by Cromwell, nor had he to contend with open and generous enemies. Our author, under the section called "shadows of the coming event," describes Pym as labouring in the House of Commons, on the 30th December, with the possession of a secret which he could not disclose, and alarming the House by his mysterious manner. He was then in possession of the secret councils of Charles and his queen, through the treacherous instrumentality of the queen's confidential attendant, the Countess of Carlisle. From her he afterwards learned the purpose of the king, resolved upon in those secret councils, to go in person to the House of Commons to arrest the five members; and by that information, and similar information from other sources, the Commons were enabled to frustrate the king's designs. Our author, apparently, does not consider, that the intrigues of the great parliamentary leader with the confidential servant of the queen expose him to any censure: we think them a detraction from his magnanimity, and a stain on the purity of his patriotism.

The interesting question remains to be considered, whether

reconciliation was possible—whether the king's conduct after the attempted arrest showed penitence on his part for the invasion of the Commons' privileges, and offered such security for the future as parliament could rely upon—or whether the Commons were justified in discarding all overtures for reconciliation, and so acting, as we think it will appear they did act, to make reconciliation impossible. Our author decides, "that there was manifestly no alternative left but civil war." "It had become clear that the attempt upon the members could not be defeated without a complete overthrow of the power of the king." He has not given the evidence upon which such decision should rest, and we can only supply a rapid sketch of it.

The Commons, after the attempted arrest, passed a declaration vindicating the privileges of parliament, and declaring "that they could not, with the safety of their own persons, sit any longer, without a full vindication of so high a breach, and a sufficient guard wherein they might confide." They then adjourned to the 11th January, but they appointed a committee of the House to sit in the mean time at Guildhall, to consider and resolve of all things that might concern the good and safety of the city and kingdom. The king took some steps to pursue his project of arresting the five members: he attended a common council in the city, where the accused members had retired, and required the assistance of the common council in apprehending them. He afterwards issued several proclamations for preventing them leaving the kingdom, and commanding magistrates to apprehend and convey them to the Tower. But these were the last flickering efforts of his power; and on the 10th of January, the day before that appointed for the re-assembling of parliament, he quitted London, and retired to Hampton Court. The letter from Sir Edward Dering to his wife, before quoted, furnishes us with the immediate cause of his departure. "The Commons go high; and not only the House, but a committee of the House, have armed and imbanded the king's subjects, not only without his leave asked, but have made a serjeant-major-general to the king's terror. For there-

upon he went out of town, and not till then. . . . Jealousies are high, and my heart pities a king so fleeting and so friendless, yet without one noted vice."

The king, on the 11th January, answered the petition of both Houses for a guard, by stating that he would, to secure their fears, command the lord mayor of London to appoint two hundred men out of the train bands of the city to wait on the Houses, and to be commanded by the Earl of Lindsay, the lord chamberlain; but the Lords appointed Serjeant-major Skippon to attend every day with two companies of the trained bands. On the same day, the Lords and Commons agreed to a resolution, that some companies of trained bands near Hull should be put into that town, where there was a magazine, with arms for sixteen thousand men, under the command of Sir John Hotham, the king's commandant; the town being of no great strength, and the country about being full of papists; and that Hotham should not deliver up the town or magazine without the king's authority, signified by the Lords and Commons in parliament. On the same day, a bill was brought up to the Lords from the Commons, enabling the Lords and Commons to adjourn that parliament from place to place, as they should see cause.¹ The bill was read three times on that day, and the lord-keeper was ordered to acquaint the king with the order concerning Hull, and to move him for his royal assent to the bill, with another bill for pressing of mariners, and a third for redeeming of captives in Algiers. On the same day, a message was sent from the Commons to the Lords, desiring their lordships to join with them to petition the king that Sir John Byron should be removed from being lieutenant of the Tower, and Sir John Conyers be recommended to his majesty for that place. In the latter petition the Lords declined to concur.

These were a series of acts directed against, and intended to curtail, the regal authority. The king, on the 13th January, signified, through the lord-keeper, that he had given his warrant for a commission to give his royal assent to the bill for pressing

¹ In opposition to the royal prerogative, which empowers the king to fix the time and place of the meeting of parliament.

of mariners, and to the bill for the captives at Algiers; but for the bill for giving power to the Houses to adjourn to London, and other places, in regard that neither he nor his council had seen it, he would take time to consider. For the fears respecting Hull, he had taken special care for the security of that place from the adjoining papists. He also made the first advance for a reconciliation with the Houses, respecting his proceedings against their members, by a message, in which he stated—"That as some think it disputable whether those proceedings were legal, and agreeable to the privileges of parliament, he was pleased to waive his former proceedings; and all doubts being by that means settled, when the minds of men were composed, he intended to proceed therein in an unquestionable way."

On the following day, the 14th January, the king sent an addition to his former message, expressed in terms which are most important, in considering the conduct of the contending parties. "His Majesty being no less tender of the privileges of parliament, and thinking himself no less concerned that they be not broken, and that they be asserted and vindicated, whensoever they are so, than the parliament itself, hath thought fit to add to his last message this profession—that in all his proceedings he had never the least intention of violating the least privilege of parliament; and, in case any doubt of privilege remains, he will be willing to clear that, and assert those by any reasonable way that his parliament shall advise him to."

The offer by the king to submit the question of his breach of privileges to the parliament, and to assert them, if broken, by any reasonable way that parliament should advise, was the most absolute submission that could be made by an English sovereign. It bound him even to consent to an act of parliament to declare their privileges; and the submission could only have been more entire by an offer to submit to personal punishment. If the maxim, as old as the constitution, "That the king can do no wrong," was to have any weight or practical effect, the Commons should have accepted that submission, and have responded to other gracious words of the king in the same message—"that they would lay

aside all jealousies, and apply themselves to the public and pressing affairs—that his care of their privileges would increase their tenderness of his lawful prerogative, both which would be the foundation of a perpetual perfect intelligence between him and his parliament, and of the happiness and prosperity of the people.”

On the following day, the 15th January, the Lords and Commons held a conference on the king's messages, and they resolved, the Lords adopting the Commons' vote, “that the impeachment, and the proceedings thereupon, were a high breach of privilege of parliament; that, in order to vindicate that breach, they proposed that a committee of both Houses might meet, to consider about it; and to petition his majesty, that those who informed him against those members might come in five days' time to charge them, or else that they might be cleared in such a way as parliament should think fit.” On the same day another conference was held, on a declaration which the Commons had asked the Lords to concur in, calling on the people to arm, and on their desire that the Lords would join with them in getting Sir John Byron removed from the lieutenancy of the Tower.

It is plain that the leaders of the Commons had no desire and no intention to allow the quarrel to be arranged by the submission of the king. The demand that those who informed him would come forward and prove the charge, presented an obstacle to an arrangement, than which nothing could be more offensive to the king, nor more impossible for him to consent to. Nor did the constitutional doctrine of responsibility of ministers justify that demand. It was not then established—not indeed, until the Hanover family came to the throne—that the king must act through responsible ministers. He might at that period act personally in the government, independently of ministers. William III., although he placed the domestic government of the country in the hands of ministers, reserved to himself the direction of foreign affairs, not associating with him practically or nominally any minister.¹ Even now, we apprehend, the Commons could not ask the sovereign to supply the names of his ministers for the

¹ Macanlay's History, vol. iii. p. 14, *passim*.

purpose of impeachment: they must act upon evidence obtainable without the aid of the sovereign.

The Commons, on the 17th January, passed a resolution intended to intimidate the king's advisers and adherents. "That all persons that had given any counsel, or endeavoured to set or maintain division or dislike between the king and parliament, or have listed their names, or otherwise entered into any combination or agreement to be aiding or assisting to any such counsel or endeavour, or have persuaded any other so to do, or that shall do any of the things above mentioned, and shall not forthwith discover the same to either house of parliament, or the speaker of either of the Houses, respectively, and disclaim it, are declared public enemies of the state and peace of the kingdom, and shall be inquired of and proceeded against accordingly."

The king made another attempt at reconciliation by a third message to the parliament on the 20th January, in the spirit of the previous messages, and with an extended range of concession. He made them a proposition, "that if they would with all speed fall into a serious consideration of all they should hold necessary for upholding his just and regal authority and his revenue, and the present and future establishment of their privileges, the free and quiet enjoying of their estates and fortunes, the liberties of their persons, the security of the religion of the Church of England, and the settling of ceremonies in such manner as might take away all just offence; when these were digested and composed into one entire body, so that he and themselves might be able to make the more clear judgment of them, it should then appear what he would do, and how ready he would be to exceed the greatest example of the most indulgent princes in their acts of grace and favour to the people" The Lords who received this message, acquainted the Commons that they had received from the king a gracious message, which filled their hearts full of joy and comfort; which, being directed to both Houses, they desired to deliver it to them at an immediate conference in the Painted Chamber. The Lords prepared an address, thanking the king for his message, and promising to take it into speedy and serious

consideration ; but the Commons refused to join in it without an addition, "that the king would raise up unto them a sure ground of safety and confidence, by putting the Tower, and other principal forts of the kingdom, and the whole militia thereof, into the hands of such persons as his parliament might confide in, and as should be recommended to him by both Houses of Parliament."

The Commons also, at the same time, opened a new line of attack upon the king, which they embodied in a petition in which the Lords concurred. Passing by the conciliatory terms and proposals of the king's two last messages, they fastened on an expression in the first message, "that he would proceed against the accused in an unquestionable way." They "called upon him to inform the parliament in a few days what proof there was against the accused members, that there might be a parliamentary and a legal proceeding against them, and they receive in justice what should be their due, either for their acquittance or condemnation. This they asked on the ground that it was unfit that they should have any members liable to so great a charge, and hindered from doing the service they owed to their respective Houses ; and that they, if innocent, should longer lie under so great a weight ; or, if guilty, avoid their deserved punishment." That was a withdrawal from the alternative they had before stated,—“that the accused members should either be charged or else cleared in such way as parliament should think fit ;”—under which they might, if they so pleased, absolve the accused from the charge, such an absolution being within the range of the king's proposition. To that petition the king replied by a fourth message, "that it was unusual to discover what proof there was against the accused ;" and adverting to the delay occasioned by the first mistake (in his mode of proceeding), and lest a new mistake should breed more delay, "he thought it necessary that it should be resolved whether he was bound, in respect of privilege, to proceed against them by impeachment in parliament, or whether he was at liberty to prefer an indictment at the common law, in the usual way, or have his choice of either. When this was resolved, he would

give such speedy directions for the prosecution as would show his desire to satisfy both Houses, and put a determination to the business."

To that petition, which seems intended to throw on the Commons the duty of deciding the mode of proceeding consistently with their privileges, the Commons, by a petition in which the Lords concurred, reiterated "their demands for proofs, and that the accused might be brought to a legal trial; it being the undoubted right and privilege of parliament that no member can be proceeded against without the consent of the House." The king replied on the 7th February, "That as he once conceived that he had ground enough to accuse them, so now he found as good cause wholly to desert any further prosecution of them. And for a further testimony of his real intention towards all his loving subjects, some of whom haply might be involved in some unknown or unwilling errors, for the better composing and settling of fears and jealousies of what kind soever, he was ready to grant as free and general a pardon for the full contentment of all his loving subjects, as should, by the approbation of both Houses of Parliament, be thought convenient for that purpose." The Lords and Commons in another petition stated, that, "notwithstanding that the further prosecution was deferred, the accused remained still under the heavy charge, to the exceeding prejudice not only of themselves but of the parliament; and referring to ancient statutes of 37 & 38 Edw. III., which enacted, that if a person made suggestions to the king of crimes committed by another, he ought to be sent, with the suggestion, before the Chancellor or Keeper of the Great Seal, the Treasurer, and the Great Council, there to find surety to pursue his suggestion; which, if he could not prove, he should be imprisoned till he had satisfied the party accused of his damages and slander, and made fine and ransom to the king; they required the king to send the persons who made the suggestions to his parliament." But this demand was a stretch of the terms of the statutes, which refer to the king's great council, and not to the parliament.

Thus ends this documentary contest, which our author calls the paper war; and in his summary of which he omits the two

most important messages, the second and third—by which the king made submission to parliament—and of the fourth message, in which, when the king was pressed to proceed, he referred it to the parliament to resolve how or by what mode he should proceed in respect of privilege; it is represented that the king “replied that he could not disclose his proofs, but that no time should be lost in preferring an indictment at common law in the usual way.” We turn with pleasure to Mr. Hallam’s description of this documentary contest:—“I cannot think that the temperate and constitutional language of the royal declarations and answers to the House of Commons, in 1642, known to have proceeded from the pen of Hyde, and as superior to those on the opposite side in argument as they were in eloquence, was intended for the willing slaves of tyranny. I cannot discover, in the extreme reluctance of the royalists to take up arms, and their constant eagerness for an accommodation, that zeal for the king’s re-establishment in all his abused prerogatives, which some connect with the very names of a royalist or cavalier.”

We have confined our narrative to the proceedings connected with the arrest; but it must not be overlooked, in considering the conduct of the king and parliament respectively, that concurrently with these proceedings there were others which were indisputably aggressions on the royal authority. It could have been no small annoyance to the king when the Commons interfered with the management of the Prince of Wales, by his governor the Marquis of Hertford, and with the place of the king’s own and his son’s residence; whilst with regard to the queen, they required her to give the name of the person who had, according to a rumour, informed her that the Commons intended to accuse her of high treason; and they afterwards ordered a letter, addressed to the queen by Lord Digby, and enclosed in an intercepted packet from him to Secretary Nicholas, to be opened and retained. The king, however, gave his royal assent to several bills, amongst others, the “Act for disabling all persons in holy orders to exercise any temporal jurisdiction or authority,” by which the bishops were deprived of their

seats in the House of Lords. But at length he took his stand on the Commons' demand, to have the nomination of the persons to be intrusted with authority over the militia, of the kingdom. The Commons, too, recorded their determination not to relinquish that demand, by protesting, in a message they sent to the king, "that unless he assured them by their messengers, that he would speedily apply his royal assent to the satisfaction of their former desires, they should be enforced, for the safety of his majesty and the kingdom, to dispose of the militia in such manner as they had propounded, and they resolved to do it accordingly."

The king returned an answer to the last demand, from his palace of Theobalds, on the 2nd March :—"I am so much amazed at this message, that I know not what to answer. You speak of jealousies and fears. Lay your hands on your hearts, and ask yourselves whether I may not likewise be disturbed with fears and jealousies; and, if so, I assure you this message hath nothing lessened them. For the militia, I thought so much of it before I sent that (his former) answer, and am so much assured that the answer is agreeable to what in justice or reason you can ask, that I shall not alter it at any point. For my residence near you, I wish it might be so safe and honourable that I had no cause to absent myself from Whitehall; ask yourselves whether I have or not. For my son, I will take that care of him which shall justify me to God as a father, and to my dominions as a king. To conclude: I assure you, upon my honour, that I have no thought but of peace and justice to my people, which I shall, by all fair means, seek to preserve and maintain; relying upon the goodness of God for the preservation of myself and my rights."

We now leave the questions between our author and ourselves to the judgment of our readers. It is difficult to shake opinions on this interesting portion of history, for they descend to us by inheritance; and much prejudice on either side embarrasses just decision. Our author presents and advocates the case of the Long Parliament with the zeal and fervour (we wish we could not add, the rancour) of one of its distinguished leaders: we have

endeavoured to present the case of the king under a constitutional aspect. Recognition of the constitution is a postulate in our arguments; we cannot say for Mr. Forster that he has tested his arguments by any reference to it. Yet we will not therefore add, in the words of Hallam, that he "prefers a republican form of government;" for we would not apply to ourselves the alternative that we "prefer a despotic form of government." But we will venture to state, that great questions in our history, affecting the conduct and fame of kings and statesmen, can only be justly determined on constitutional principles; and, again quoting our great historian, we say, "we do not argue from the creed of the English constitution to those who have abandoned her communion."

ART. II.—MARITIME LAW—MASTER AND OWNER.

A Treatise on Maritime Law; including the Law of Shipping, the Law of Marine Insurance, and the Law and Practice of Admiralty. By Theophilus Parsons, LL.D., Dane Professor of Law in Harvard University. 2 Vols. Boston: Little, Brown, & Co. 1859.

MR. PARSONS argues, in the preface to his work on Maritime Law, that the several departments of which this law is composed have been hitherto too much disconnected by authors. He urges that the law of shipping, and the law of marine insurance, could not be learned except in their connection with each other. Thus, no work on shipping would leave the subject of general average untouched, and certainly that no work on insurance could do so. But does this topic belong more properly to shipping or to insurance? and he asks, "Is there any topic of either of these systems of law which can be treated of with any fulness, without a frequent reference, more or less direct, to the same topic as it stands in the other of those systems?" We admit, to a great extent, the propriety of the learned author's opinion,

that a general and connected treatise on the several divisions of the law, such as he describes, is eminently desirable ; and further, that his own volumes demonstrate that it is possible to accomplish the task which he set himself in pursuance of his opinion.

That, however, which is well suited for the author of an elaborate and complete treatise to undertake, a writer in these pages must carefully abjure. There is the same difference between such a treatise and an article, as there is between a finished picture of an extended scene and the small study of one tree in the landscape, or between the magnificent composition and a hasty sketch of hill, valley, sky, and flood. We think, therefore, it will be more advisable, on the present occasion, to direct our attention to one point only in the law of which Mr. Parsons has treated at large, and we select that which relates to the *master* and *owner* of a ship.

For reasons connected with the vast expansion of British commerce which has occurred within the last few years, the head of shipping in our law has necessarily become deserving of more attention than formerly. Questions belonging to it arise more frequently than ever, and in each succeeding case the facts from which they spring are apt to be more and more numerous, intricate, and difficult of disentanglement. It will, therefore, prove no inappropriate employment of our pages, if we endeavour to excite the attention of our readers to a branch of the subject of shipping law, which, strange to say, is left particularly mute in English treatises, leaving it to be surmised that it is a part of the subject but little developed either in the civil law or in the maritime law of Europe, which is called in our older writers the law maritime, and recognised as binding here. One principal repository of this law is that body of regulations relating to the sea, shipping, ships' crews, &c., which is known as the Law of Oleron, and which dates from the time of Richard I., if it was not framed by that monarch himself. These laws have always been enforced in our Courts of Admiralty, and there are traces of their having been at a very early period recognised and acted upon in the Courts of Common Law. In fact, these laws are in a peculiar manner in-

incorporated into the maritime jurisprudence of the country, being copied into the Black Book of the Admiralty as part of its substance, and being continually referred to in the public instruments of later times, as an important part of the maritime law of this country.¹ Let us see, then, by way of founding our inquiry, what are the rules there laid down for regulating the relation of master and owner of a ship in the most important branch of that relation, viz., the power of the master to bind the owner, by the contracts entered into by the former, in the absence of the latter, for the purposes of the ship and voyage. Molloy tells us, "the Common Law hath held the Law of Oleron reasonable, that if a ship be at sea, and takes leak, or otherwise want victual or other necessaries, whereby either herself be in danger or the voyage may be defeated, that, in such case of necessity, the master may impawn, for money or other things, to relieve such extremities, by employing the same to that end."² The title of the Law of Oleron referred to is, the twenty-second chapter, which is stated with perfect correctness; and the same rule is found in the Laws of Wisbuy, art. 13; and the Laws of the Hanse Towns, art. 49 and 60; both which bodies of sea laws are frequently cited, and admitted as authorities in our Admiralty Courts. And the reason is pointed out, in an early common law case, why the master has always been held to have this power committed to him; "because he is the person trusted with the ship and voyage, and therefore reasonably may be thought to have that power given to him implicitly, rather than see the whole lost."³ In other words, the person who is intrusted with the safety of the ship, and the success of the voyage, must, it is no more than common sense to consider, be intrusted with the power to take whatever measures he deems to be indispensable to those objects. Where, therefore, the necessity for a given proceeding, by the master of a ship at sea, or on her voyage, during which his authority as master continues, is mani-

¹ See 3 C. Robin. Adm. Rep. 242. Sir Leol. Jenk. vol. i. 87. Com. Dig. Admir. E. 12.

² Molloy, De Jur. Marit. et Naval., lib. ii. cap. ii. s. 14. So Co. Lit. 11 b.

³ Bridgeman's case, Hob. 11, 12. See per Parke B. in Mackenzie v. Peole, 11 Exch. 638.

fest, the law will enforce, against the owner, a pledge of the ship made by the master; the fact notwithstanding, that he had no express grant of power or authority from the owner to impawn in case of necessity. Always it is necessity which alone gives occasion and propriety to the exercise of the power; always the step taken must be indispensable for the above objects—the very means and the only means to obtain the desired end; for the authority of the master to raise money in this way, only arises where he cannot obtain the necessary advances, on the personal credit of his owner.¹

Necessity then furnishes the ground for the exercise of the power of binding the owner, by pledging his ship, and it being observed that the necessity does not fully appear in places where the advances wanted can be otherwise obtained; the master has power and authority so to bind him. The rule was similar in the Civil Law.² It was also the rule of the old law of France,³ and is the rule of the modern law,⁴ as may be seen fully explained in the comments of various French jurists of great celebrity.⁵ It is part of the Spanish maritime law,⁶ as well as that of Holland.⁷ The law of Scotland is to the same effect, and the principle on which a shipmaster binds his constituents, is stated by the Scotch lawyers to be that of a mandate implied from his office to order whatever is necessary for the vessel.⁸

In an American treatise on this division of law,⁹ it is laid

¹ Wallace v. Fielden, 7 Moo. P. C. 400. The Hebe, 2 W. Rob. Adm. R. 146, 150. Stainback v. Fleming, 11 C. B. 85.

² Voet, Comment. ad Pandect. 14, 1, 7, Vinnius in Peckium, fol. 183, Note A.

³ Ordonn. de la Mer, 1681, Bk. II., tit. 8, art. 2. Valin Comment. lib. ii. tit. 1. Du Capitaine, art. 17, 19.

⁴ Code de Commerce, art. 214.

⁵ Répertoire de Jurisprud., Tit. Capitaine de Vaisseau Marchand. Pardessus Droit Comm., tom. iii. art. 633, 634, 717. Boulay—Paty Cours de Droit Marit., tom. i. 368, 376, 379.

⁶ El Consolato del Mare, cap. 33, 16, edit. 1788; also cap. 104, 105, 106. Emerigon, tom. i. cap. 4. s. 11.

⁷ Van Leuwen, Coms. Dutch Law. Bk. IV. c. 2. s. 9.

⁸ Stair's Institutes, Brodie's Supplement, p. 953, 4th Edit. See Balfour's Pratique, p. 614.

⁹ Flanders's Treatise on Maritime Law, Boston, U.S., 1852, chap. VI., p. 174.

down to be "a general principle of the Marine law, that the master of a ship has power to bind his owners in all contracts for repairs and supplies, reasonable and fit and proper for the ship, under the actual circumstances of the voyage. This rule is founded as well upon the implied assent of the owner, as with a view to the convenience of the commercial world." To us, we must confess, it appears that most of the cases decided in America found the power upon necessity. The subject will be found treated very comprehensively, in a most clear and profoundly learned judgment of Mr. Justice Story, in the case of *Pope v. Nickerson*, where the law of almost all nations on this question is stated, reviewed, commented on, and contrasted.¹

The result of all the foregoing extracts and references seems to be nothing less than that the general voice of civilized nations concurs in proclaiming the same, or very nearly the same, rule on this point. The master has power to bind his owner for the necessary purposes of the ship or voyage; first, by raising money on the personal credit of the owner at the place where the ship may be when the necessity arises; or, if that mode be impracticable, by pledging the ship on bottomry. Now it is on the former branch of the rule, that by far the most complicated and nice questions are continually arising; and it is upon it, therefore, that we propose to dwell in the following pages, with a view of bringing together and digesting, as far as space will allow, such of the authorities as it may be most useful to our readers to consult, in order to form their opinions for themselves.

Now, first, the rule being settled as above, the inquiry comes, Is this the whole extent to which the law has been developed by judicial decision in this country? Does the rule apply when the ship is in a home port, where the owner has an agent, or, if not, may be readily communicated with? Is it incumbent on the lender of the money to see that the necessity is made out?

In answer to this we have it laid down, that this power of the

¹ 3 W. Story's *Massach. Rep.* 496. See also the *Ship Fortitude*, 3 Sumner's *Massach. R.* 228, in exact conformity with *Wallace v. Fielden*. See 3 Kent's *Comment.* pp. 208, 214, 8th Edit.

master to bind the owner by bottomry bond, given by him in order to raise money for the necessities of the ship or voyage, is vested in him, although the owner resides in the same country where the ship is in port, provided there is no means of communication with the owner, and the exigences of the case require it;¹ and what is most material to observe is, that the lender of the money, on the bond, is bound to ascertain whether such supplies as the master represents himself to stand in need of for the ship, can be procured on the personal credit of the owner, instead of resorting to the bottomry bond.²

But we have not met with any authority for saying, that the lender is compelled by our law to see to the *absolute* necessity of the loan, before advancing his money. Indeed, such a requirement would manifestly lead to delays, in cases where delay would be ruinous, and would go so far to render nugatory the power of raising money in this way, that we cannot suppose the law to be so conceived. To demand from the lender full proof of the existence, at the time of the loan, of the absolute necessity, for the successful prosecution of the voyage, of the advance of the sum lent, would be, in many cases, to require an impossibility, which the law *never* does.

All that is requisite for the lender of the money is to give some proof of the existence, at the time, of that *legal* necessity which, perhaps, is nearly equivalent to urgent inconvenience: the law is not understood to call upon him to decide on the expediency, in the actual circumstances, of obtaining for the ship the supplies or the repairs which the captain may think or represent to be necessary, for enabling the ship to complete her voyage.³

"Necessaries" are defined to be, whatever is fit and proper for the service on which the vessel is engaged, and what the owner, as a prudent man, would have ordered if present. Therefore

¹ Wallace v. Fielden, 7 Moo. P. C. 398, 409.

² Heathorn v. Darling, 1 Moo. P. C. 5. See The Nelson, 1 Hagg. Adm. R. 175. The Augusta, 1 Dods, 286, 287. Soars v. Rahn, 3 Moo. P. C. 9. See also 1 H. Bla. 114: 7 B. & C. 30. 2 Rose Bank, Cas. 91.

³ The Vibilia, 1 W. Rob. 1. See 1 Parsons on Maritime Law, 385, (Boston, U.S., 1859.)

advances of money may be included under the term necessities, as supplied to a ship in a foreign port, it being proved by the evidence that the necessities were wanting, and that the money was *bonâ fide* advanced for the purpose of procuring them.¹

For supplies, then, or repairs, or for money to obtain such supplies or repairs as a prudent owner if present would order, on the ground that they were indispensable for the purposes of the voyage, the master may pledge the owner's credit. This position indeed might, perhaps, seem to follow pretty closely from the consideration, that commerce by sea could not possibly be maintained without it; the general concurrence in it of all maritime nations, in all ages of which there remains any history, pretty clearly indicating that no other mode of carrying on commerce has suggested itself to the ingenuity of mankind. Still, as we are desirous, above all things, of rendering this article as suitable for practical purposes as we may, some further authorities are appended by way of elucidation and illustration. If, then, money or necessities are advanced, the *onus probandi* lies on the advancer, not to show absolute necessity, which would often be impossible, and is therefore not required by the law,² but the sort of necessity above explained; and secondly, that the money was applied to the purposes for which it was advanced; and it is no answer to allege that the party advancing gave credit, not to the owner, but to the master exclusively, who informed such party that the articles wanted were to be supplied on his own account, and not for the use of the ship, because it was already sufficiently equipped; for that is only putting in issue whether the articles in question were necessary, the account being made out on the face of it against the owners, and signed by the master. The law on this subject is not substantially distinguishable as understood in the Common Law and Admiralty Courts.³ In both, the principle is to consider what a prudent owner, if he had been present, would have done under similar circumstances; and

¹ The *Sophie*, 1 W. Rob. 368.

² Abbot, Shipping, p. 25. [Edit. 9th.]

³ The *Alexander*, 6 Jurist 251. Webater v. Seekamp, 4 B. and A. 254.

the only difference as to the advance of necessities and of monies is, that though in both the *onus probandi*, as above limited, is the same, there is wisely and properly a difference in the *extent* of proof required in the two cases. Limited as above, there is no case in our law which does not require, that the proof that the articles furnished were necessary should come from the plaintiff; that is, he must prove that they were what a reasonable and prudent owner would have required.

No doubt the doctrine which casts the onus of proving the necessity on the tradesman, or, as the Admiralty Courts phrase it, the "material man," is founded on great and important principles, and the rule is wisely framed to prevent great abuses.¹ The American rule is in conformity with the above.² There it is held that "the lender is to see that a case of apparent necessity is made out, and he is to take care that he does not knowingly advance more money than what may be fairly deemed fit for the occasion;" and the civil law is nearly the same.³ It is not required that there should be an extreme necessity, an invincible distress, or a positive urgent incapacity, to justify the master in ordering repairs, &c.⁴

Still, the necessity which is to be proved by the plaintiff, amounts to nothing more than urgent inconvenience. For instance, it would not be possible to say that a tradesman, who had furnished to a vessel, on the order of the captain, articles of food suitable for the use of a ship's crew, and conformable to the habits of diet of seamen, should be bound to prove, in order to recover the price from the owner, that there was an absolute necessity for the goods, as, for instance, that the crew would have died of inanition if they had not immediately been supplied with food. But the question is, what would a prudent owner have

¹ The *Alexander*, 6 Jurist 241.

² The *Fortitude*, 3 Sumner's Massach. R. 233, per Story J.

³ Cujacius, tom. i. col. 1450-1453.

⁴ Per Story J. The *Ship Fortitude*. 3 Sumner 228, 237. And see 1 Parsons on Maritime Law, 386. From this work, which contains a most elaborate and comprehensive treatise on the whole subject of maritime law, (including sea insurance), it does not appear that the topics of this article are more fully developed in America than here.

done? Now, a prudent owner would have seen that it was for his interest to keep the crew in such a state of health and strength, by means of proper food, as would enable them to perform the work of the ship in a satisfactory manner: that want of provisions justifies a seaman in quitting the ship: that he must be found with food so long as he remains on board, and is willing to do his duty: that if he is left to go without one of his meals, and there is no prospect that he shall fare better when the next meal-time comes, he may justifiably quit the vessel:¹ that he may, in certain circumstances, take measures which will render the master liable to penalties of £20, for each occasion on which the seaman's food shall be shown, either to have been insufficient in quantity, or of bad quality, or unfit for use;² and that in other circumstances the seaman may be enabled to receive compensation in respect of a reduced supply of provisions during the voyage.³ These considerations would, it cannot be doubted, irresistibly impel a prudent owner, if present, to see that the crew were properly supplied with provisions suitable to their habits; and therefore the master has power to bind the owner when absent, by ordering such articles on the owner's credit. Another instance of the above necessity so limited as has been pointed out, is the following:—The state of the weather making it highly desirable that a ship which was coming into the port of Newcastle-on-Tyne should be towed over the bar (which lies at the mouth of the Tyne), and up that river, it was held that the captain had power to bind the owner, by his contract with the steam-tug owners, for this service; for that it was within the province of the master to employ a steam-tug.⁴ Another case of this kind of necessity is the following:—If a charter-party stipulates that the account for freight, demurrage, and detention is to be settled at the port of discharge abroad, it is implied that the captain has authority to make a settlement which will bind

¹ *The Castilia*, 1 Hagg. 59. *The Eliza*, 1 Hagg. 182.

² 17 & 18 Vict. c. 104, s. 221.

³ 17 & 18 Vict. c. 104, s. 223 *The Josephine*, 1 Swab. 152, S. C.; 2 Jur. N. S. 1148.

⁴ *Beldon v. Campbell*, 6 Exch. 891.

owners.¹ Of what are the kind of expenses which are not authorized by the rule, the following is an instance:—Some sailors, belonging to a vessel, having being lamed by an accident, the captain took lodgings for them at a public-house, telling the landlord that the owner of the ship would pay for what the men had, their lodgings, &c. This was decided to be a species of outlay with which the master had no power to saddle the owner, because it was not an expense necessary for the prosecution of the voyage.²

It may perhaps be objected that the rule is indefinite, because of the difficulty of ascertaining the meaning of necessity; but as has been observed by high authority—"The law of cases of necessity is not likely to be furnished with precise rules. Necessity creates the law; it supersedes rules, and whatever is reasonable and just, in such cases, is likewise legal. It is not to be considered as matter of surprise, therefore, if much instituted rule is not to be found on such subjects."³ The necessity which justifies a sale of ship, the necessity which entitles the master to pledge the owner's credit for repairs, and that which authorizes a borrowing on bottomry, are all different grades of necessity.

In America the law of various states treats this part of the subject as follows:—In Pennsylvania it has been decided that the owner of a canal boat is liable for provisions and necessaries furnished, and charged to the captain of the boat.⁴ In Kentucky the law gives the master of a ship authority, as such, to bind the owner for repairs and supplies.⁵ In Delaware the owners are liable for the contracts of the master made in the usual course of business.⁶ In Missouri, those furnishing supplies to a vessel are held not to be bound to inquire whether the person in charge of it as master or agent is rightly in possession, before the owner

¹ *Alexander v. Dowie*, 1 H. & N. 152.

² *Organ v. Brodie*, 10 Exch. 449.

³ *Per* Ld. Stowell, *The Gratitude*, 3 C. Rob. Adm. R. 266. The same description of the necessity in the cases cited by *Parson's Maritime Law*, 386. Note (2.)

⁴ *Phillips v. Tapper*, 2 Barr's R. 323.

⁵ *Patterson v. Chalmers*, 7 B. Monroe's R. 595.

⁶ *Davis v. Marshall*, 4 Harrington's R. 64.

can be made liable.¹ In Maryland the owner of a vessel is liable for necessary supplies, furnished by order of the master.² In Texas it has been decided that when a person undertakes to contract for supplies to a ship, the presumption is that he is master of the ship, and that he contracts as such.³

It has been held, as a matter of Scotch law, in case of a Greenock ship on which repairs, &c., were done at Hull, by order of the master, and the account was made out "to the master, and owners of the ship *Jeanie*," attested by the master, and addressed to the agents for payment, but payment not demanded for some months, and in the mean time the owner paid the agents for the repairs, who then became embarrassed, and the tradesmen applied to the owner for payment—that the owner was still liable.⁴

We next proceed to a family of decisions which have occurred in the High Court of Admiralty of this country, under the stat. 3 & 4 Vict., c. 65, an Act to improve the practice and extend the jurisdiction of the High Court of Admiralty of England. This enactment in s. 6, probably reviving an ancient jurisdiction of the Admiralty Court, which had been gradually taken from it by the common law courts by prohibition, in times when those courts acted upon a jealousy of the powers of the Admiralty, expressly gave that court jurisdiction to decide, *inter alia*, "all claims and demands whatsoever, for necessities supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a country, or upon the high seas, at the time when the necessities were furnished, in respect of which such claim is made." Now although, as regards necessities, the jurisdiction given to the Admiralty, by this statute, is interpreted as being confined to foreign vessels only;⁵ yet, for the purposes of illustrating the question what are necessities, and inquiring into the

¹ *Steamboat Lehigh v. Knox*, 12 Missour. R. 508.

² *Abbott v. The Baltimore Steam Packet Co.*, 1 Maryl. Chan. Dec. 552.

³ *Sydnor v. Hurd*, 8 Texas, 98.

⁴ *Stewart v. Hall*, 2 Dow. R. 29, 35, 40. The demand was for £23, 9s. 6d. Judgment affirmed, with £60 costs.

⁵ *The Ocean*, 2 W. Rob. Adm. R. 371.

nature of the evidence required in such proceeding, (on which, unfortunately, very little information is to be gleaned,) the decisions are not less valuable because they relate only to claims against foreign ships; for it does not seem to be material for this purpose, that in the Admiralty credit is taken to be given *prima facie* to the foreign ship itself.¹ One of the cases most pregnant with practical information, is that of the *Gosfabrick*,² decided by Dr. Lushington in 1858. The vessel was a brig, which came into the Tyne in December, 1857, and remained there in charge of the master until 14th January, 1858. A butcher of Newcastle-on-Tyne had, during this period, supplied the ship with meat and other necessaries to the value of £27; and though it does not appear that any inquiry was made or evidence produced as to the number of the crew, the nature or quantity of the provisions supplied with reference to the reasonable requirements of the crew—*ex. gr.*, whether the pieces or joints of meat supplied were such as were adapted to the usual habits of living among a brig's crew; yet we must probably assume that the account furnished by the butcher did not show on the face of it that the meat consisted of sweetbreads, or rump-steaks, or legs of lamb. The learned judge, in the course of a judgment in which he went into all the facts with some particularity, said, "I am of opinion that the meat, so supplied, came strictly within the term 'necessaries,' and the amount due for it might have been recovered by proceedings against the ship." This case, then, recognizes fully the old law of the common law courts, that victuals for the crew are necessaries within the above meaning; but it leaves unsettled the question whether it is requisite for a party, who has supplied articles of this sort, to go into evidence to show that the quantity supplied was in proportion to the numbers of the crew, that they had no other meat on board at the time his supplies were furnished, &c.

In a case at common law, where the master had borrowed money and purchased with it meat, flour, and other neces-

¹ The *Perla*, 4 Jur. N. S. 741.

² 4 Jur. N. S. 742.

saries for the use of the ship, the ordinary rule was recognized, that the owner was liable, as the goods were ordered by the master, and were necessary for the vessel.¹

Another point deserving of attention was decided by Dr. Lushington in the case of the *Gosfabrick*. The butcher had sued the master for the £27, the amount due for his supplies, and in that suit had lodged the master in jail. A third person, at the instance of the master, paid the butcher the debt and costs, taking a bill of exchange, drawn by the master upon his owners, for the above sum. This was dishonoured; and Dr. Lushington considered these circumstances to create a broad distinction between this and ordinary cases of supplies of necessaries. The butcher, it seems, if he had taken a bill of exchange, drawn by the master on the owners in payment of the debt, would not probably have been thereby deprived of his remedy against the ship; but the above circumstances gave a different aspect to the case, because the necessaries had already been paid for, when the bill was drawn, and the party suing in the cause was the person who advanced the money to pay the butcher, and in whose favour the bill was drawn, and it was held that he could not recover against the ship; for that, although the statute gave jurisdiction to the court to entertain a suit, &c., to recover the value of necessaries supplied to a foreign ship, or money advanced to procure such necessaries,² it gave no jurisdiction to enforce a suit to recover money paid to discharge a debt already incurred for necessaries. The distinction may at first sight appear somewhat narrow; but it is to be remembered that the reason of giving the extended jurisdiction to the court, was principally founded on the great difficulty, amounting nearly to impossibility, which met foreign ships, putting into English ports in distress, of procuring such necessaries as anchors and cables;³ and if the presence of the master on board were to be considered as falling within the definition of necessaries, it would follow that the

¹ Per Parke B. *Mackenzie v. Pooley*, 11 Exch. 638.

² *The Sophie*, 1 W. Rob. 368.

³ *The Gosfabrick*, 4 Jur. N. S. 742.

remedy must be extended to money advanced to get him out of prison, howsoever his debts had been contracted, which never could have been the meaning of the act. According to the established rules for the interpretation of statutes, the legislature having used the word "necessaries," which has a received meaning in the courts of law; viz.—such things as a prudent owner if present would have ordered, as being required for the safety of the ship or the prosecution of the voyage; the legislature must be taken to have used it in that sense, there being nothing in the statute to show a different intention. In the above instance, the captain made default in his duty in not at first obtaining the money to pay for the necessaries, either on the credit of the owners, or, if that was not then available, by bottomry bond; and he had no power to charge the owners, or to give a good title to the lender to obtain from them, the sum required for his redemption from imprisonment. That is true in the case of such an imprisonment as before stated, occurring in this country by virtue of the regular process of a court of law; but it does not appear to follow from the decision, that in no case would a sum, lent to recover the master from imprisonment, be recoverable against the owners. For instance, if the master were arbitrarily seized and detained in some foreign port in a country in a semi-barbarous condition, without fault of his own, where a sum of money was advanced as the sole means for his extrication, and it were shown that his place in the ship could not be supplied, and that his skill and experience were absolutely necessary for the navigation of the vessel and the prosecution of the voyage, such sum might probably be recoverable from the owners, as advanced for necessaries, within the above meaning of the term.

In general, the master's implied authority to borrow money for the necessary use of the ship, is not confined to the period during which the ship is actually *in transitu*: that is not the meaning of the term "necessary for the prosecution of the voyage;" but it extends to a home port as well as a foreign one, provided the owner is absent, and no communication can be had with him

without great prejudice and delay. But where the master might have easily communicated with the owner, who was resident only eleven miles distant from the harbour where the ship was, and the master "was in want of money to clear the ship, and to pay seamen's wages, and for blocks, hog's lard, nails, customs, charges, and had been unable to raise money by disposing of a part of the cargo, as the owner had directed, and sent three messages to the owner for money but got none, and then applied to the plaintiff, and obtained £10 from him to defray these expenses with; it was considered that he had no authority to borrow the money, and that the owner was not liable to the lender, although the fact was, that the money had been advanced for the necessary use of the ship, and on the credit of the owner exclusively.¹ There the plaintiff had the ship's papers left with him, in order to satisfy him that the person who applied to him, as master of the ship, really filled that character. It was also proved that the money was expended in the purchase of the above necessities. Here, however, some weight is perhaps due to the consideration, that the owner, who had, only three days before, given authority to the master to do a particular thing, for the purpose of raising money, viz., to sell part of the cargo, thereby excluded the supposition of an authority to raise money in any other way. In another case of the same class, evidence was given to show that the money and supplies in question were necessities;² but it does not appear how far the evidence extended, or what was the nature of it. There also it was left undecided whether, if every other circumstance concurred to make the owner liable, it would be in itself a defence for him, that the person whom he had constituted virtually the master, was not on the register as such. But, with reference to this point, a plaintiff who had furnished necessities on the order of a person who took upon him the functions of master, and was obeyed by the crew as such, although he might not be the master named on the register,

¹ *Johns v. Simons*, 2 Q.B. 425.

² *Stonehouse v. Gent*, 2 Q.B. 431, Note. See Valin, *Nouveau Commentaire sur l'Ordonnance de la Mer*, iii. tit. 9. art. 11.

would—it is probable we think, the point never we believe having been expressly decided—be held entitled to recover. A tradesman or other person, in such case, would not be expected to do what the law does not give him any means of doing: he is not to summon witnesses and administer oaths before he can be said to have proved that the person acting as captain is the real master of the vessel: it is submitted that, if he have made all such inquiries within his power as a prudent and careful man would make, that will be held sufficient to entitle him to recover, as regards the point of evidence, that the person ordering the goods had the authority, implied in the situation of master, to bind the owners.

In all the cases, except the last, it will be observed that the questions agitated related solely to the circumstances of the things supplied to the ship. The problem was, Given the real master and the real owner, when has the master power to bind the owner, so as to give a title to recover, against the owner, to the creditor? But the aspect which these cases take, is materially altered when the question is, whether the proper person has been sued as owner by the creditor, or, in other words, who is the owner whom the real master has implied authority to bind for necessaries? Now, on examining these cases, the reader will find it not immaterial to bear in mind, *decantatum illud*, that the expressions of judges are always to be taken *secundum subjectam materiam*. With this caution we proceed to observe, that the first step for the solution of the above problem seems to be, to revert to the origin of the implied authority which the law looks on as vested in the master. Because the master is sent out, by the owners, in charge of their ship, appearing to all the world as the agent of the owners, in matters relating to the usual employment, the sailing, manning, victualling, fitting out, and repairing, the ship, which are left wholly to his management in places where the owners do not reside, and have no established agent, therefore the character and situation which he fills, afford presumptive evidence of authority, from the owners, to act for them in these cases.¹ An additional ground for considering the master invested,

¹Abbott, Shipp. Part ii. cap. 3.

by law and practice, with this authority to bind his owners in respect of victualling, seems to be afforded by the enactments of 17 & 18 Vict., c. 104, already adverted to; by which, on the complaint of three or more of the crew, the *master* is liable to a penalty of £20, for each occasion in which the crew have not been supplied with proper food; strongly showing that Parliament proceeded on the ground, that the master was fully in possession of the means to procure sufficient and proper victuals for the crew; which could only be the case by reason of his having the power to bind the owners, so as to give a legal title to recover against them to the creditor. All this shows that when we meet with such expressions as the following—"It is perfectly settled now, that the liability to pay for supplies to a ship depends on the contract to pay for them, and not on the ownership of the ship,"¹ the meaning in the first place is not that there must be a written or verbal contract between the owner and the creditor, to pay for the goods, &c., supplied by the latter on the master's order; but that the person professing to be master was the proper master, and the circumstances in which the supplies were made, were the proper circumstances, to give rise to the implication of law that the power resided in the master of contracting as agent for *the person sued as owner*, and with his authority. It has only been quite of late years, that questions of this form have come forward for adjudication. When the operations of commerce were more simple, voyages shorter, and transactions far less numerous than at present, it never became necessary to consider what would be the consequences of a change of owners pending the voyage. It is with reference to that, or analogous circumstances, that such expressions as the above are to be read; for it cannot be laid down, as a general proposition, that, to entitle a person who has done repairs, or furnished goods for a ship, to sue the owners in a court of common law, it is necessary that the credit should have been actually given to them.² But it may be very reasonable that such person, who has supplied the ship during its

¹ *Mitcheson v. Oliver*, 5 E. & B. 443; and *per Crompton J.*, *Myers v. Willis*, 18 C. B. 89; see 11 East 435; and 8 East 10; *Robins v. Power*, 4 Jur. N. S. 810.

² *Per Willes J.* *Whitwell v. Perrin*, 4 C.B. N.S. 416.

voyage, but after a sale and exchange of owners, should not be entitled to recover against the new owners in a court of common law, for goods supplied before the exchange, to the order of a captain appointed and sent out in charge of the vessel by the former owners. The mere fact that they are the legal owners on the register, is not sufficient to render them liable. Probably the proper remedy is to proceed against the ship in the Court of Admiralty.

There seems, however, to be good ground for considering, that a person who purchases a ship, while on her voyage, is in general bound by the acts of the person who is master at the time of the purchase, from that time until the purchaser does some act to determine the latter's implied authority¹ to bind the owner.

The question that next arises is this: Assuming the goods to be of the nature of necessaries, that the proper person is sued as owner, and that the goods were furnished to the order of the real master, are there still any circumstances which will furnish an answer to the action on the part of the owner? And the truth seems to be, that there is only one valid defence in such a case; viz., that the goods were furnished in pursuance of a collusion or conspiracy between the creditor and the master, for the purpose of defrauding the owner. It is certainly no defence to show, that the master took up the goods, with the purpose of converting them, &c., in fraud of the owner, if the plaintiff was not cognizant thereof, and all was *bonâ fide* on his part, as evinced by his having made all reasonable inquiries. "It will not be sufficient, either upon principle or upon determinations of the court, that the master has taken undue advantage against his employers. That is a matter between him and his employers, with which a third person has nothing to do, unless personally implicated, by the facts of the transaction in the fraud that may have been practised."² So an agreement, between the agent of a ship and a broker, whereby the latter undertakes thoroughly to refit the ship, will not affect the rights of a third party, who supplies necessaries to

¹ *Robins v. Power*, 4 Jur. N.S. 810.

² *Per* Lord Stowell. *The Gratitude*, 3 C. Rob. Adm. B. 272.

a foreign ship under 3 and 4 Vict., c. 65, without any knowledge of such agreement.¹ But, certainly, it is not easy to discover from the decisions as reported, what are the inquiries, of whom they are to be made, and with what sort of evidence he is to be satisfied. In most cases, where a ship is in want of supplies—especially of stores or provisions—there exists no means for making inquiries of any one but the master and the crew; there is no neighbourhood, as in the case of a question of giving credit to a householder; and in practice the tradesman sees only the master, and must, it would seem, be content with his assurance, that the goods are *bonâ fide* required for the purposes of the ship, in the nature of necessities, the tradesman exercising his judgment, whether the articles ordered are such, in quality and in quantity, as are fit and suitable for the wants of the particular vessel and crew.² He must show enough done to satisfy a jury, that he exercised all the caution that a prudent man, acting *bonâ fide* would be expected to do, before he complied with the master's order. It seems to be manifest that the tradesman or lender cannot be required to go on board the vessel, and examine, for himself, the state of things there, so as to ascertain that the alleged need for the goods really existed. He cannot be called on to commit a trespass in order to found his right of action; for, out of an infraction of the law, a right never can arise to the party infringing the law. And there does not appear to be any reason or any authority for supposing that a tradesman, giving credit in the case of a shipowner, is placed in a situation of greater difficulty than other tradesmen giving credit, over and above the difficulties that have already been stated as attaching to his situation, and which, in themselves, are greater than are thrown around those who deal with agents in ordinary cases of transactions on land. This is a part of the difficulties with which the question of the liabilities of the owners of merchant ships is beset, and which render it so arduous a matter to deal with, in the courts, as well

¹ The Perla, 4 Jur. N.S. 741.

² The drawing of a bill on the owner is not evidence, though drawn for "value received in stores," that they came to defendant's hands.—Scott v. Miller, 5 Scott, 4.

of law as of equity.¹ An instance in which a court of equity felt this difficulty was the following:—A vessel was sent on a voyage, the purpose of which was to procure a cargo of palm oil, for the benefit of the owners, with money and merchandise, with which they had supplied the captain, for that purpose, and for the general expenses of the ship, during the voyage. The owners alleged that the means so supplied were amply sufficient to meet all the requisite outlay of every kind; but there was, in the judgment of the court, a sufficient *prima facie* case made out, that, without the advance presently to be mentioned, the captain could not have made the purchase of the palm oil, on his arrival at the place of loading the cargo, Porto Novo, on the west coast of Africa. In these circumstances, the plaintiff advanced a sum, amounting to £1200 sterling, to the captain at that place. This sum he expended in completing the cargo, purchasing necessaries, and in repairs and seamen's wages, and five months subsequently², handed to the plaintiff a bill of exchange, drawn by him the master upon the owners, for the above sum, and, as a collateral security, he also handed to the plaintiff a bill of lading for thirty tons of palm oil in casks, which were the property of the owners, and which made part of the cargo then on board the ship. The bill was dishonoured by the owners, and the captain refused to deliver the oil to the plaintiff, on the arrival of the ship in this country, and they repudiated the whole transaction between the captain and the plaintiff, alleging that the captain had been intrusted by them with a sufficient amount of money and merchandise to meet the whole expenses of the voyage, and to bring home the cargo (which was brought home by the captain), without borrowing or taking up money from any other person. The plaintiff having filed his bill for relief, the court held that he had no legal or equitable right to any part of the cargo, but that he was entitled to equitable relief. The case was rendered more difficult of decision, owing to the death of the captain pending the very long litigation which arose out of the transaction. It

¹ See *per* Stuart V.C. *Ashmall v. Wood*, 3 Jur. N.S. 234.

² See the case of the *Gosfabrick*, cited *supra*, p. 253.

was found, however, and rightly in the opinion of the court, that the monies advanced to the captain by the plaintiff, had been applied, in the terms of the directions given to him by the owners, for their benefit, in or towards the purchase of palm oil, provisions, necessary repairs, wages, and otherwise. But this principle was clearly laid down, that a contract entered into by the master of a ship, for the benefit of his owners, unauthorized by them, but of which they have obtained the benefit, is a contract in respect of which the owners are liable in a court of equity. It was said, "that it could not be permitted that the owners of a vessel, making use of a cargo bought by means of money supplied upon a loan unauthorized by them, can take a benefit which they could not have acquired without that money, and leave the person whose money was, in effect, employed in this way, to bear the burthen of the transaction, *because he cannot prove that the representations of the master, upon which he relies, were in every respect true.* It has been argued that it was the duty of the plaintiff to prove that the owners' money was exhausted. How was it possible for the plaintiff to prove that? All that the plaintiff could know was what, from his opportunities of knowledge on the spot, and from the representations of the captain made to him, were the circumstances of the case." The court then put the case of the captain having properly, in the discharge of his duty, expended all his owners' money, and afterwards advancing money of his own, without any authority, to purchase cargo, and then bringing home the ship and cargo, and asked if it could be said that the owners were to take this cargo, so purchased with the money of the captain, and put into their own pockets the proceeds of the cargo? There was said to be no authority for such a proposition. The general propositions were also laid down, that "want of authority for the contract is not a reason why the owners should have the benefit of the contract, although it was made without their authority. If they had proved that the contract of the master was fraudulent, and his representations untrue, and that he wilfully wasted or misapplied the money, even in that case, which is not the present case, I am not prepared to say that a

person dealing as the plaintiff did, under the circumstances in which the plaintiff was, should bear the loss of that misconduct of a person who, in this matter, as to the purchasing of this cargo, and as master of the vessel, was unquestionably the agent of the owners. That undoubtedly is a question of much greater difficulty than even the very difficult question which it is my duty to decide in this case." And the plaintiff was held to be entitled to a decree in his favour, for so much of the sum advanced by him as was proved to have been paid or applied for the benefit or use of the owners, in or towards the purchase of palm oil.¹ This decision, then, which was very fully discussed in repeated arguments where the common law authorities were largely cited and much examined, is an authority for the proposition, that where the master has been furnished, by the owners, with sufficient supplies and money, for meeting contingent expenses during the voyage, but in the course of it has been, in consequence of unexpected events and causes,—*ex. gr.* falling short of ropes and other stores, the bread spoiled by damp, part of the beef and pork becoming unfit for food—obliged to expend the sums placed in his hands, and thus finds himself left in the position of being unable to procure a cargo, and thus prosecute the voyage and fulfil the purposes of the owners, and the duty with which he is charged of bringing home a cargo; he has an implied authority to borrow money for that purpose, and the owners, on his bringing home the cargo, will be liable to the person who has advanced the money. In fact, it seems to come back to a case of necessity, as above defined. To raise the money is what a prudent owner, if present, must have done under the circumstances of the case; for it is impossible to suppose that a prudent owner would have adopted the only alternative, *viz.*, to take the ship home without any cargo, and thus render the voyage, and all the expenditure in respect of it, altogether fruitless. The case also leads to this conclusion. It is no answer for the owners to say, "We, at the outset of the voyage, supplied the captain with ample

¹ *Ashmall v. Wood*, 3 Jur. N. S. 232. See also S. C. 2 Jur. N. S. 827; 1 Jur. N. S. 1130. See *Mackintosh v. Mitcheson*, 4. Exch. 175.

means to meet all the current expenses of the ship, as well as to purchase the required cargo, and therefore he had no authority to charge us with any loan he might raise in the course of the voyage, for such loan in those circumstances could not be necessary;" and the reason why it is not an answer is, that emergencies may arise, in the course of a voyage, which were not contemplated in the owners' estimate, of what would be a sufficient sum to supply the captain with, and which might require such an expenditure to meet them as would render a loan indispensable for the purposes of the voyage; and when the fact of such emergencies having actually arisen, and of the application of the money intrusted to the captain accordingly, is made out in evidence, the lender must recover, on proving the application of the sum advanced to the purposes of the voyage. In that case, also, the captain's evidence of these matters was held to be admissible and proper evidence. It may further be observed, that according to the statement in the plaintiff's bill, as agreed in the answer of the master, who was one of the defendants, it was not the practice, on the West coast of Africa, and was in fact impossible, for shipmasters to borrow money on bottomry, or by a regular hypothecation of the ship or cargo; and that the master could not have procured money, for completing his cargo and for the needful repairs and disbursements, in any other way than as above mentioned. The owners had, from month to month, been kept advised, by the master, of the above facts as they respectively occurred, and of his want of money; but, though fully informed that it was necessary for him to borrow money, for the purposes of the voyage, they had not given him any instructions or authority as to borrowing money, for the purpose of purchasing cargo, in the event which occurred, of the money and other property of theirs in his hands not being sufficient to procure a full cargo, nor as to borrowing money for repairs or other necessities.

With respect to the case put in the above, of a master supplying money of his own for the purposes of the voyage, it has lately been held in equity (in a case, however, of very peculiar circumstances), that the master had a lien on the freight in

respect of expenses and liabilities incurred by him abroad, in supplying provisions, &c., &c., required by certain charter-parties, concluded by him abroad on behalf of the owner.¹ At law the question seems to have been decided the other way,² as to the master's lien on the *ship* for money, for necessities advanced by him; but in that case, which was sent out of Chancery for the opinion of the King's Bench, no question was involved as to the master's right of lien on the freight.

There are cases in which a co-owner may be liable for repairs, &c., ordered by the master, even after he has ceased to have an interest in the ship. Thus, when a ship goes into dock for repairs, which are done upon the general credit of the owners, and one of these either legally, or in fact ceases to be a part-owner, he may nevertheless continue liable, with the others, for the work done upon her, unless he determines his liability by express notice to the tradesmen.³ But the mere fact of a man's being registered as part-owner of a ship, does not give the master (the appointee of the co-owner) power to pledge his credit for necessary repairs.⁴

It has appeared from the above how necessity is the foundation of the implied authority of the master to bind his owners; and we may fitly close this imperfect article by mentioning, that in cases of urgent need a sale of the ship itself may be made by the master, so as to give a valid title against the owners, though it is not sufficient to constitute such necessity, that the sale be *bonâ fide*, and for the benefit of all concerned. But the following is an example of such a necessity:—A ship suffers sea damage to a very considerable extent, rendering repairs indispensable. In the foreign port (in China) into which she gets, the master has no credit and no funds, and none were procurable, by bottomry or otherwise, for the purposes of repairs. He takes the best advice, and sells the ship by public auction. Here all the

¹ *Bristowe v. Whitmore*, 1 Johnst. 96.

² *Hussey v. Christie*, 9 East 426; see S.C. 13 Ves. 600; compare *Lister v. Payne*, 11 Sim. 350; *Ex parte Halkitt*, 3 Ves. & B. 135.

³ *Per Jervis cap.* in *Brodie v. Howard*, 17 C.B. 119.

⁴ *Hackwood v. Lyall*, 17 C.B. 124.

requisites of the law were held by Dr. Lushington to have been complied with, and the sale to be valid.¹ But it is only in cases of absolute necessity that the master is authorized to sell, either by the law of England or the Maritime law.²

As the object of the foregoing remarks has been to bring under the reader's notice some points in the law of master and owner, which, though apparently not without practical importance, are, we believe, for the most part not ordinarily to be met with, in a collected form, many of them resting on decisions which have occurred since the publication of most of the extant treatises on shipping law, we shall here conclude, leaving the remainder of the learning on this subject to be sought for in the usual books of reference, among which that by Mr. Parsons may henceforth take its place.

ART. III.—THE CIVILIANS OF DOCTORS' COMMONS.

AMONG the ancient vestiges of our great city, which only wait the imperious nod of the improver and the capitalist to surrender a venerable existence, the College of Advocates in Doctors' Commons is now prominently conspicuous.

It is known that the eminent corporation to which that college belongs, is both willing and free to sell this its corporate property, so temptingly placed in the centre of the old metropolis, whenever it shall find a speculative and acceptable purchaser.

Under ordinary circumstances this would be little of itself; but, in the present case, the conversion of the building will be the destruction of the corporation. With the material edifice will fall the immaterial union of Advocates; and when the time-worn gables of the former shall give place to the startling erec-

¹ *The Margaret Mitchell*, 4 Jur. N.S. 1193.

² *Camell v. Sewell*, Exch. 4 Jur. N.S. 978; See *Ireland v. Thompson*, 4 C.B. 149.

tions of modern commerce, the Doctors will cease to be Commoners, and an old and excellent school of law will be lost to England.

For this the public has to thank itself; for, when a few years since, its representatives in Parliament thought good to reform the judicatory of the Courts Christian, they at the same time, without murmur or dissent, gave their imperial permission for the annihilation of the college.

We do not, however, propose to trouble ourselves or our readers about this. Our business is with the men whom the college has produced and nurtured.

In many ways, and for many generations, they have been remarkable and conspicuous. No bar can show more eminent men, or a greater number prominent in public capacities, than this college. At a period when the Serjeant-at-law never emerged out of his own peculiar occupations—when the outer barrister was an apprentice whom the rulers of the country ignored, the civilian moved *en plein air*, was a counsellor to his government for home affairs, and a negotiator abroad—in a word, was a statesman when the others were merely lawyers.

Such antecedents have excited in us a desire to make the literary acquaintance of the advocates; and we are gratified to find, that there are sufficient materials to supply the necessary elucidation.

The origin of Doctors' Commons is curious.

About the beginning of the reign of Henry VIII., Dr. Richard Bodewelle being then Dean of the Arches, the advocates of that court constituted themselves into a club, which met during every term. They were not numerous; they were rich in professional profits, and they had the learning of the age. Thus they formed a society which, in its hours of relaxation, may without injustice be regarded as the anticipatory Noviomagians of the sixteenth century.

In this club the external gravity of the clerical advocate gave place to the refined conviviality of the deipnosophist, and, as

amongst the priests of Isis (whom Apuleius knew), there were *suaves epulae et faceta convivium*.

The society has continued through similar successors to the present day. Its members still dine in common—still possess the learning of the times—and, no doubt, still display the geniality of the old sodality.

There are sufficient materials, as we have observed, for the history of these *commensales*.

In the first place, a list of the members of the college has been kept (and is preserved) from the 22nd February, 1511–2, to the present time.

In the next place, a catalogue, or rather a series of short memorials of the advocates, was long since printed (though not published) by one of its members.

The author, Dr. Coote, though now forgotten, would appear to have been a gentleman of considerable learning and no mean ability; for a production of his obtained a sneer from Matthias, and provoked a review from Porson. It is this Dr. Coote who is our authority for the following notices.

In his catalogue, as in the actual list, we find, foremost in order of time, the councillors of the burly Henry, those who found the fitting law, and established the convenient fact, for his divorce from Catharine of Arragon—the visitors of the abbeys, and the remote founders of the protestantism of England. Of these we select a few specimens:—

RICHARD SAMPSON (entered March 20, 1514) was a wary advocate, or a compliant assessor, in favour of Henry's divorce, wrote forgotten treatises in favour of his supremacy, and served him diplomatically.

RICHARD WOLLEMAN (October 31, 1514) was *alter idem*.

JOHN BELL (November 21, 1516) was another diplomatist.

JOHN LONDON (April 7, 1519) was one of the visitors of the monasteries, but must have strangely misused his opportunities; as he died in the Fleet in 1543.

JOHN ALEY (June 3, 1519) had the distinction of being mut-

dered by a son of the great Earl of Kildare, in 1543, after his promotion to the archbishopric of Dublin.

ROWLAND LEE (October 8, 1520) was president of the Marches of Wales, and assisted in the incorporation of the principality with England.

WILLIAM BENET (June 12, 1521) was ambassador to the Pope on the subject of Henry's divorce.

JOHN (afterwards Sir JOHN) TREGONWELL (December 9, 1522) was an active agent in the same matter, and was rewarded with an abbey.

EDWARD (afterwards Sir EDWARD) CARNE (November 13, 1525) was another agent for the divorce, an ambassador and a visiter of monasteries.

ANTHONY BELLYSIS (October 29, 1528) profited so largely by his share of the monastic plunder, that he left sufficient estate to induce Charles I. to ennoble his descendant with the title of Fauconberg.

NICHOLAS HAWKINS (November 30, 1528) was "a good negotiator."

NICHOLAS WOTTON (October 29, 1530) was ambassador once to Scotland, and twelve times to the Continent, and, says Isaac Walton, "died not rich, though he lived in the time of the dissolution of abbeys."

RICHARD LAITON (or LAYTON) (June 5, 1531) was introduced into public business by Cromwell—was a zealous investigator of the doings of the monasteries, and was rewarded in direct ratio to the strength of his criminations of their inmates.

THOMAS (afterwards Sir THOMAS) LEGH (October 7, 1531) was an advocate of the same school and fortunes.

WILLIAM PETER (March 8, 1533) was an ambassador, and a liberal sharer in the confiscations of the monasteries; through these means, making an estate for which his son was ennobled by the title of Lord Petre—*Memmi alta propago*.

By whatever standard they be tried, these men must be considered to have been statesmen, with hard work to be done (yielding inestimably good results), and tough minds to do it.

The next era presents, in the leading advocates in Doctors' Commons, a loathsome reflex of the *infamia temporis* under the rule of the wretched Mary.

In this reign persecutors were the fashion in Doctors' Commons, with the exception of one of the members, who was a martyr.

EDMUND BONER (October 15, 1526). Who knows not this clerical Jefferies?

RICHARD FOXFOORD (October 29, 1526) was another hell-hound of the same colour and breed. He was Stokesley's chancellor.

HENRY MORGAN (October 27, 1528) burnt Bishop Ferrar, and was rewarded by the humane Cardinal Pole with the bishopric vacated by the victim.

JOHN STORYE (1539), WILLIAM GEFFREY (1541), JOHN FULLER (October 10, 1546), were all eminent persecutors.

But a phoenix amongst lawyers comes next, viz.—

ROWLAND TAYLOR (November 3, 1539). He was burnt at Hadley. "Of all the Marian martyrs (says Fuller), Dr. Taylor had the merriest and pleasantest wit."

Amongst the celebrated persons of the short reign of Edward VI., we have—

WALTER HADDON (May 11, 1553). Scholar, public man, and one of the authors of the *Reformatio Legum*.

The age of Elizabeth gives us high and healthy spirits in the College; for out of what other kind of minds could Burleigh and his great mistress have chosen public servants?

First amongst these must be named—

HENRY HERVIE (January 27, 1550). He gave to the doctors their present estate. "In the inscription upon his coat-of-arms (says Dr. Coote), he is denominated *hujus societatis stator*."

VALENTINE DALE (January 14, 1553) assisted at the trial of Mary of Scotland.

ROBERT WESTON (October 1, 1556) was made Chancellor of Ireland in 1567. "Of his decrees in Chancery, not one was ever reversed."

THOMAS WILSON (March 3, 1561) was an author whom Dr. Johnson commends "for the politeness of his style, and the extent of his knowledge."

WILLIAM DRURYE (May 5, 1561) was one of the civilians consulted by Elizabeth, in the case of the Bishop of Ross.

GEORGE ACWORTH (November 3, 1562). We cannot pass over this worthy, because he illustrates a political fact. Being too intemperate and too irregular for England, he was made Judge of the Prerogative Court and Master of the Faculties in Ireland.

BARTHOLOMEW CLERK (January 4, 1573) was employed by Elizabeth as a *diplomate* in the Low Countries.

Under James and the Charleses, we still find public and conspicuous men among the advocates.

DANIEL (afterwards Sir DANIEL) DUN (January 22, 1582) was one of the commissioners appointed by James I. for adjusting an union with Scotland.

RICHARD COSIN (October 14, 1585). The celebrated defender of the self-criminatory oath *ex officio*.

JULIUS (afterwards Sir JULIUS) CÆSAR (January 22, 1586), the well-known Master of the Rolls.

JOHN COWELL (October 9, 1590). The author of the first law dictionary. The "Dr. Cowheel" of that delicate *raillieur*, Sir Edward Coke.

WILLIAM (afterwards Sir WILLIAM) BIRD (October 9, 1590). Though he was member for the University of Oxford, we should not have named him if he had not been connected with a *genuine* Shakesperian discovery of our own. It was before this venerable doctor, in his chambers in the edifice given by Dr. Hervey (afterwards replaced by the present buildings), on a day in the month of June, 1616, that Dr. John Hall, joint executor with his wife Susanna, appeared and proved the will of his immortal father-in-law, William Shakespear.

HENRY (afterwards Sir HENRY) MARTIN (October 16, 1596) was prominent in the disputes between Charles I. and his parliament, and was the father of the regicide. , ,

ARTHUR DUCK (January 25, 1614) was one of the negotiators at Newport, on the part of Charles I., and was the author of the still well-known book on the authority of the civil law.

JOHN (afterwards Sir JOHN) HAYWARDE (August 5, 1616), the historian.

RICHARD ZOUCHE (January 30, 1618), the legal author.

WILLIAM LEWIN (October 26, 1632) was hung by the Parliamentarians as a royalist plotter.

JOHN GODOLPHIN (no date), the author of the *Repertorium Juris Canonici*, &c.

ISAAC DORISLAUS (November 4, 1645). The same that was murdered at the Hague.

JUSTINIAN (afterwards Sir JUSTINIAN) LEWYN (February 6, 1647) was judge martial in the expedition to Scotland in 1639, which Sir John Suckling so mercilessly satyriized in pleasant doggerel.

JOHN MYLLES (July 3, 1650) was judge of the army to the Parliamentarians.

JOHN BERKENHEAD (December 3, 1661) was the editor of the *Mercurius Aulicus*, and Dryden's "learned and worthy friend."

Under William's domination we have high-beating hearts of all kinds—gallant gentlemen, *spectandi in certamine martio*, who had fought at the Boyne to his loss or his gain; Whig lawyers aiding the Court with their characteristic energy, and Tory lawyers with the same energy confronting and thwarting it. Under him and under his successor we also find in the College middling wits, and the associates of greater wits.

LEOLINE (afterwards Sir LEOLINE) JENKINS (November 11, 1664), the great judge and negotiator.

WILLIAM (afterwards Sir WILLIAM) TRUMBULL (April 28, 1668), secretary of state, and ambassador to the Porte from 1687 to 1691. The patron of Pope.

CHARLES DAVENANT (November 20, 1675), the eldest son of the laureate, a commissioner of excise and inspector-gene-

ral of exports and imports. Our first writer on political arithmetic.

STEPHEN WALLER (October 23, 1685), the son of the laureate. He was employed upon framing the articles of the treaty of union with Scotland.

MATTHEW TINDALL (November 13, 1685), the notorious author of "Christianity as old as the Creation."

THOMAS LANE (November 23, 1686). We learn from Dr. Coote that this gentleman, who was a Northamptonshire man, left the pacific abodes of Oxford to join the squadrons of King James in Ireland. We have been specially informed by John D'Alton, Esq., of Summerhill, Dublin, the learned and accomplished author of many works of inestimable value to Ireland and her history, that this doctor was "quartermaster in the troop of the gallant Sarsfield." Under that great leader he fought at the ford of Oldbridge, in the leading rank of those terrible horsemen who precipitated the noble mercenaries of William back into the Boyne—who shot down or sabred Caillemot and Schomberg, and the uncassocked Bishop Walker—who, even in flight, repulsed the victorious Enniskilleners—and who, luckily for England, alone of all James's army really fought on that sharp day. He was wounded in the battle, but recovered and returned to Oxford, whence he repaired to Doctors' Commons. In 1701, we find him with Sir Bartholomew Shower, *in banco regis*, in the celebrated case of *Blackborough v. Davis*, showing cause why a mandamus should not go to the spiritual court, to command an intestate's grandmother to make distribution amongst his aunts. Salkeld and Peere Williams, who report the case, do not mention our doctor's name; but we have been favoured by Dr. Lee of Hartwell, the great nephew of the great civilian Sir George Lee, with a manuscript report from the private papers of that distinguished judge, and in this report we find that Dr. Lane "spoke to the point of the case," and, as the report shows, ably and learnedly.

WILLIAM KING (November 12, 1692), the author of the "Dialogues of the Dead," and the friend of Dean Swift.

JOHN (afterwards Sir JOHN) COOKE (October 23, 1694), was a lieutenant of infantry at the battle of the Boyne. William made him his advocate-general, though the Tories recommended Dr. Lane, saying—very naturally—he would rather give the place to one who had fought for him than to one who had fought against him. Sir John was also one of the commissioners for effecting the union with Scotland.

GEORGE (afterwards Sir GEORGE) LEE (October 23, 1729). This is the great civilian, whose reports of his own decisions were published some years ago by the late Dr. Phillimore. This publication startled the legal public into the knowledge, which never should have been lost, that in this gentleman there was a judge who had performed for testamentary law all that Lord Stowell was said to have done for the maritime law. He was the statesman, of whose paper on the right of search Montesquieu observed, that it was a *réponse sans réplique*.

With this great judge we enter modern times, and there we will stop. We cannot, however, forbear a few observations upon Sir William Scott, afterwards Lord Stowell, whose fame extends *a Gadibus usque auroram*. He is regarded as the representative man of Doctors' Commons; and, with two exceptions, was the personification of all the old glories of the college, and something more. But he was not a diplomatist, and was no speaker, whether in his earlier career, as he pursued his ordinary labours at the bar, or whether at a later age, as he essayed a speech in the house of parliament—in fact, *lingua torpebat*. It is to this circumstance that Dr. Coote alludes, when, with the pardonable euphuism of a contemporary and associate, he observes, "Speaking of him as an orator we may say, *Illi purus et pressus et, in quantum satis est profluens, sermo non decet*."

His lordship had a property which would not have been expected within the grave precincts of Doctors' Commons.

He was a *farceur*, and, like the fat knight, was a provoker of the same quality in others, having to wince under the barbed sarcasms launched by Canning and Jekyll against his pomposity and *embonpoint*. (*Vide* Thomas Moore's "Diary.")

It is merely superfluous to descant upon the high mental endowments of this great judge. But we cannot forbear the complacent remark, how flattering it must be to the pride of authors to find, that the real solid and substantial fame of Lord Stowell now rests upon what he wrote, and what was published, *i.e.*, his "Reports." Without them he would be an empty name—such as abound in Dr. Coote's pages—and no more.

We have said enough, we think, to show what metal this noble old college has been composed of. There still remain *commensales* worthy of their antecedents; but they will outlive the institution, and with that will pass away one phase of the gentlemen of England.

ART. IV.—THE REGULATIONS AFFECTING COMMISSION AGENTS.

By ALEXANDER PULLING, Esq. Barrister-at-Law.

ACCORDING to the last census, the number of persons in Great Britain, other than attorneys and solicitors, pursuing, as a distinct vocation, the business of agents, in the management of property, or personal or commercial transactions, and remunerated by fees or charges in the nature of a commission, exceeds *fifty thousand*.

This large number is altogether exclusive of merchants and traders only occasionally selling on commission; and stewards and clerks regularly retained and paid by salary.

The business of these *commission agents* extends over almost every branch of industry and enterprise, and almost every kind of civil transactions—the selling and letting houses and land, collecting rents, chartering ships, selling goods and merchandise, negotiating loans of money, *bargaining* in stocks, shares, and securities, effecting life assurances, and insurances against fire

and sea-risks ; the sales of the good-will of trades, of law and medical practices, of advowsons, benefices, and schools, negotiating partnerships, procuring places for the unemployed as clerks and servants ; and, as the police reports inform us, pursuing their calling of procurators not only in the labour and money markets, but, in spite of all objections, even in the *matrimonial market*.

At present, the legislature has provided no system of regulations for this hybrid class. There are, in the case of auctioneers and appraisers, some scanty regulations, the chief object of which appears to be, to bring a small addition to the revenue in the shape of *licence duties* ; and, in the case of the brokers of the city of London, the corporation of that ancient city has the privilege and profit of licensing each person coming legally within that denomination at the rate of £5 a head ; but, beyond this, any individual who is *not an admitted attorney or solicitor* may pursue the calling of a commission agent without restriction or control. He may have confided to him the management of the lands, houses, and private affairs of the inhabitants of a whole county, the collection and receipt of rents and debts, the disbursement of whole revenues, the negotiation of endless private transactions. He may take on himself many of the most important and confidential of the duties of solicitors, without incurring the responsibilities which solicitors are under.

Attorneys and solicitors have, from an early period, been subject to a system of legal regulations, imposed by the legislature and the judges, to secure efficiency and upright dealing among members of the profession. The statute 6 & 7 Vic., c. 73, consolidating the previous provisions on the subject, contains a body of regulations providing for the education, examination, and formal admission and registration of all attorneys and solicitors ; and, so long as the transactions in which they are employed are intrusted to these practitioners apparently in their character of attorneys or solicitors, the courts at Westminster are ready to exercise the most vigilant control over them, to check immoderate charges, and call each practitioner to account

for his defaults and malpractices: and the queen's revenue takes from these attorneys and solicitors not only an annual sum for their certificates of qualification to practise, but a good slice out of the young beginner's capital, in the shape of a heavy stamp duty on the *articles of clerkship*, and a further amount on the document of *admission*.

The result of all this is, a very great inconsistency. The law, which imposes such stringent regulations in the case of attorneys and solicitors, does not exclude from competition with them, in some of the most important branches of their ordinary calling, those who are subject to no regulations or restriction at all. Attorneys and solicitors have a monopoly as officers of the courts in the conduct of actions and suits; and have, with barristers, pleaders, and certificated conveyancers, a very limited monopoly in the actual drawing and preparing certain legal documents; but in the large field of business, in which professional skill, character, and experience are so important, in letting, selling, and managing property, in the negotiations for private arrangements, or commercial transactions of any kind, no such exclusive privileges exist. If, in any of these matters, the person employed happen to be an attorney, he is subject to a system of surveillance, from which he is free if he be *not on the roll*. In the latter case, the employer is for the most part without any adequate remedy for the fraudulent conduct, malpractice, or trickery of his agent.

Here is a discrepancy which surely deserves the attention of the legislature. Either the attorney is hardly dealt with, when called on summarily, on an *ex parte* statement, to answer charges of extortion or malpractice in private transactions in which he has been professionally engaged; or persons in a similar situation, who are not on the roll of attorneys, unjustly escape.

Now, a broker skilled in the mysteries of the Stock Exchange, embarking on behalf of his principal in complicated transactions in the funds, in mines or railway shares; a land, house, or estate agent, letting and selling his client's property, and collecting the rents; a clerical, legal, or medical agent conducting the

negotiation for the sale of an advowson, a next *presentation*, or the good-will of a professional business; a loan and discount agent, employed by a necessitous borrower—have certainly as much opportunity of being dishonest and extortionate as attorneys and solicitors. Indeed, the reports of the proceedings in actions, and suits, and criminal trials, in which a knavish broker, house agent, or money-lender is complained of, too often show how prevalent are the evils, how ineffectual the remedies, which the existing law affords to call to account those who are *manifestly in default*.

There are, of course, to be found among the large body to which we are referring, men of high character and worth; but with the honourable and industrious are also found persons of every shade of character—the tricky advertiser, the *touting* “office” *keeper*; persons who have been struck off the roll of attorneys, discarded clerks, uncertificated bankrupts, and dishonest insolvents. Our police reports, and the proceedings in our civil and criminal courts, show how frequent and various are the disputes which arise from the transactions in which *these* agents are engaged.

The accounts and charges of brokers have been the subject of express regulation in the chief commercial cities of Europe from the earliest time; and in the city of London there still exists a very ancient system for regulation of this class of agents, which however, like most of the institutions of that venerable municipality, is so rusty in its machinery that it is rarely resorted to with any advantage. The French, Spanish, Portuguese, and Prussian codes, however, all minutely provide for the rendering and strict taxation of the accounts of all commission agents. In this country, of late years, the criminal law has been made to reach agents guilty of embezzling their principal’s money, or illegally selling or pledging their goods; but a dishonest commission agent, who does not come within the letter of the criminal law, is too often able to set his employers at defiance.

Our common law afforded a civil remedy against defaulting agents by *action of account*,¹ once perhaps simple and expedi-

¹ A proposal for reviving this proceeding was brought before the *Law Amendment Society*, by the writer, in 1848.

tious, but, by the ingenuity of the old pleaders, rendered worse than the evil it affected to cure; and the proceeding by suit in Chancery, which succeeded the action of account, simply affords, in the majority of cases, an immunity to defaulters, and too often visits with ruin those who have the hardihood to call them to account.

Assuming that there is a just foundation for the summary jurisdiction now exercised by the courts at Westminster over the accounts of attorneys and solicitors, it can hardly be deemed inequitable to prescribe some sort of control over the dealings of those who equally fill a fiduciary character.

A stockbroker who has, by his malpractices, brought his too confiding employer to ruin—a salesman, who has jobbed away his principal's property—a house or estate agent, who has made extortionate charges—is not less rightfully the object of a summary jurisdiction than an attorney whose client complains of his bill of costs being too heavy. Could not some of the rules relating to attorneys be advantageously adapted to the cases to which we are referring? Why should not all commission agents be liable to have their charges taxed, and their accounts summarily investigated, like those of attorneys and solicitors? Further, is there any thing very unreasonable in the suggestion, that all agents of the class already described, should be subject to a system of registration, and be liable, on conviction of dishonesty or malpractice, to be suspended or expunged from the list?

Such a reform could be carried out by a very simple machinery. A registrar with a very small staff of clerks, and a few salutary rules as to certificates of character, &c., of the applicants for admission, would suffice to secure the public from disreputable practitioners; and provisions, somewhat similar to those respecting attorneys' bills of costs, would generally prevent extortionate charges. The Chancellor of the Exchequer would, by a certificate tax on these agents, such as that now required of attorneys, gain for the public revenue at least a *quarter of a million per annum*. The more respectable members of the calling could hardly grumble at such a small tax; and it would go far to keep away those whose respectability was *questionable*.

The registrar should have a summary power of taxing, as of course, any agent's charges in dispute, within one month after account rendered or payment, taking as the guide the present accustomed and legal charges of agents in their several departments; and, for general information, the registrar should publish the rate of commission, &c., authorized by custom and by the existing statute law (see 10 Anne, c. 19, s. 121; 12 Anne, s. 2, c. 16; 53 Geo., c. 141, s. 9) as to annuities, loans, &c.

Any judge of either of the superior courts, or of the county courts, should, under the same restrictions as the 6 & 7 Vic., c. 73, s. 37 imposes, have power to compel delivery of an account, by an agent who had not already rendered such an account, on *prima facie* proof of his having received his principal's moneys, or been overpaid, and under the same restrictions to refer all accounts for taxation by *the registrar*, or one of the taxing masters, or the registrars of the county courts.

By provisions of a somewhat similar character to those made under the 6 & 7 Vic., c. 73, the *expenses of taxation* of charges for agency might be made always to fall on the party really in the wrong.

These suggestions, it will be seen, have at least one virtue—simplicity—to recommend them. They are founded on the equity of providing similar regulations for cases nearly identical. They have in view, before any other consideration, the public good; but they concern peculiarly the members of the legal profession, whose everyday experience must convince them how urgently some system of control is required over the charges and dealings of the class to which we have been referring.

ART. V.—*A Selection of Leading Cases on Mercantile and Maritime Law, with Notes.* By OWEN DAVIES TUDOR, Barrister-at-Law. London: Maxwell, 1860.

“**M**ELIUS est petere fontes quam sectari rivulos.” We do not know who was the original author of this pretty metaphor, the language of which implies an amount of poetical power which we should hardly expect in Lord Coke; however this may be, the maxim is embalmed in his First Institute, and it remains as containing the advice of that great master to the students of the English Common Law. The wisdom of this advice is confirmed by the experience of all who have tried the experiment, and have fairly encountered the labour it involves; and no one who is habituated to recur to the original report, will ever rest content with the most learned and accurate digest, abridgment, or treatise.

We doubt, however, whether Lord Coke would have recommended the aspirants of his time to attack the Year Books while as yet they had absolutely no acquaintance with the law. It would seem rather that the four books of his Institutes were composed, as well as named, in imitation of the Institutes of Justinian, and that they were intended to serve the same purpose, “*ut sint totius legitimæ scientiæ prima elementa.*”¹ The imperial lawgiver himself recommends the students of his day to make themselves familiar with these institutes before entering on the study of the Pandects, which resemble our volumes of reports more closely than any other monuments of the Roman law; and so we think that the lawyers of the seventeenth century acted judiciously when they prepared the way by a course of Coke for the study of the Year Books.

An average student now would stand aghast were he told that Coke upon Littleton was to be regarded as an elementary work;

¹ Justin. Inst. Proœm. s. 4.

and, in fact, we suspect that but a small proportion of the practitioners of the present day have any intimate acquaintance with that work ; and we doubt whether, in that number, we can reckon a gentleman who included the great commentary in a list of many legal works which, as he told us, he had "got up" during a month's long vacation holiday on the continent. Either industry is an extinct virtue among us ; or, as we prefer to think, all fields of knowledge have been so greatly extended in modern times, that though the absolute acquisitions of our scholars are as great as at any former period, yet these acquisitions bear a continually decreasing proportion to the whole amount of human knowledge.

What then is a law student to do ? Is he to follow the same course as an eminent advocate and author lately deceased, of whom we have heard that he began his legal studies with the earliest Year Book ?¹ No ; for he soon found himself outstripped by less industrious contemporaries. The mass of the reports is now so great, and, we may add, no inconsiderable proportion of that mass is so worthless, that no one can be found who has time for the perusal of the whole number, especially where he cannot tell but what part of that time will be wasted, or worse. As a means of escape from this difficulty, Mr. Warren, one of the present Masters in Lunacy, claims, we believe, to be the first who recommended the law student to form for himself a collection of leading cases. The suggestion, whoever originated it, was destined to be a stock bearing great fruit. Mr. Warren's advice on this subject was, that the leading case, *having been selected*, should be carefully studied, and the previous decisions and authorities on which it is based compared and reconciled. This process would fix the case and its principle thoroughly in the mind, so that it would not readily be forgotten ; and the case, so fixed, would serve the memory as a centre to which any decisions

¹ This gentleman was ill-advised : Mr. P. A. Smith, the author of a work just published on the education for the English bar, and indeed other modern authorities, recommend the perusal of the Reports *backwards*, i. e., beginning with those of the current year. To Mr. Smith's work we would, in passing, particularly direct the attention of our readers.

or authorities, which might be subsequently met with, would be readily and accurately referred. The suggestion was, we have no doubt, most valuable at the time it was made, although it has at the present day little more than historical interest, as having given an origin and a name to a most useful series of works, the title of the latest member of which stands at the head of this article.

It is clear that the success of the above process depends mainly on the judgment shown in the selection of the leading case; but this is just the point where a student is likely to fail. Nothing but considerable familiarity with the reports, or with actual practice in court, can enable any one to decide whether a particular case is or is not entitled to that honourable appellation; and any one who has made the trial must have experienced how liable the judgment is to err on this point. The case may well have the characteristics commonly assigned to a leading case. It may turn on some important rule of law, and may appear to collect and reconcile very many previous conflicting decisions, and yet it may be found that the rule which the judge has extracted, and couched in terms apparently clear and terse, really gives no help towards the solution of cases which arise in practice; the assistance derived by the student from the leading principle laid up in his memory or note-book, is no more than that derived by a jury from a judge's summing up: "If you believe the plaintiff's witnesses, you must find for the plaintiff, and if you believe the defendant's witnesses, you must find for the defendant."¹ Even if the rule extracted be not nugatory, how can a student tell that it has been adopted? Every reader will remember instances where subsequent judges have passed over, in perhaps contemptuous silence, principles which some one of their predecessors has pronounced to run through all the cases.

Happily we are now saved this difficulty. In 1837 appeared the first edition of *Leading Cases*, by Mr. John William Smith,

¹ An instance of this will be found in the rule as to the right to an account, laid down in *Ex parte Hamper*, 17 Ves. 112.

who, during his short career, did so much for the literature of his profession. In 1841 a second edition was published by the author which was followed by a third edition in 1849, and by a fourth in 1856: the two latter were edited by Messrs. Willes and Keating, both of whom have since been elevated to the judicial bench. In 1849, a selection of *Leading Cases in Equity* was published in one volume by Messrs. White and Tudor; a second volume by the latter gentleman alone followed in 1850, and he has since edited with additions the two volumes. He also, in 1856, published a volume of *Leading Cases on Real Property, Conveyancing, and the construction of Wills and Deeds*; and in the present year has appeared his volume on *Mercantile and Maritime Law*, which is the volume at present under review.

Each of these six volumes contains thirty or forty cases, which are all thoroughly entitled to the name of "*Leading Cases*," in the sense in which we have above explained the term to be used; and to each case is appended a note, in which all the subsequent decisions upon the subject of the case are arranged and stated at greater or less length. Of course it is not pretended that the whole subject of Equity jurisprudence is exhausted by the two volumes of Messrs. White and Tudor, nor that the notes to the recent volume embrace the whole of our Mercantile and Maritime law; but we venture to say that nothing but actual experience can show how seldom points occur in practice which the authorities here cited will not solve. If the series were completed by two volumes of leading cases on the pleading and practice of the Courts of Common Law and of Chancery, and by a new volume on Parochial and Criminal law, there would be no further need for any Cyclopædia of Law, which has been thought by some to be a desideratum in our literature. We should mention that a small volume of leading cases on Pleading and Parties to Actions was published in 1847 by Mr. Finlaison: this contains six cases, with notes on the same general plan with the volumes we are noticing; but we think that it leaves room for a more extended work on pleading and practice at Common Law, and probably there is no Equity draftsman who has not regretted

the want of some work on his science more full than Drewry, and more modern than Mitford.

Sufficient time has elapsed since the first publication of Mr. Smith's volumes, to test the judgment shown by him in the selection of cases. The authority of one only of these cases has been shaken, while one other has been rendered obsolete by recent statutory alterations of the law. The recent editors have retained *Godsall v. Boldero*, but they have printed at length the case of *Dalby v. The India and London Life Assurance Company*, by which the former has been overruled. *Crogate's* case, with its note on *Replication de injuriâ*, is relegated by them to the place of abode of obsolete decisions, and they have substituted for it the case of *Taylor v. Cole*, with a note in great part new. The authority and usefulness of all the other cases selected by Mr. Smith remain unimpaired; and his editors have frequent occasion to remark, that the conclusions on doubtful points to which he has come in the notes, have been subsequently confirmed and adopted as law. None of the cases comprised in the more recent publications have in any manner been affected by lapse of time.

One point common to all these volumes is especially worthy of notice; we mean the excellence of the index with which each is furnished. These indexes comprise a tolerably full abstract of the note to each leading case, arranged under the head of the principal topic discussed in the note; the entries in the index form generally complete sentences, so that the trouble of turning to the page indicated may often be saved, where the point in question is not one admitting of nice distinctions; but this fulness is of more importance to students than to practitioners. How well these volumes are in their plan adapted to the wants of the former class of readers, is attested by the frequency with which cases from them appear in the list of subjects for the examination of students of the Inns of Court; and the aspirant to the honours of this examination will find, that in no better way can he test his mastery over any particular note, than by consulting the portion of the index which relates to it. If he feel

that he understands and remembers all that he reads in this index, he need not fear any questions on the subject which are likely to be proposed to him in Lincoln's Inn Hall. In this respect the latest volume of *Leading Cases* is in no degree behind its predecessors.

We now come to the more particular consideration of the volume before us. The number of cases reported at length in it is forty, and the number of notes is twenty-six. As the title indicates, the volume is devoted in part to Mercantile and in part to Maritime law: the cases on the latter occupy about half the space of the former. This is a feature well worthy of notice, as showing the increasing attention which is given in the profession to topics which but seldom come before our ordinary courts. All our readers have heard the fame of the judicial eloquence of Lord Stowell; but we do not think we wrong them in supposing, that familiar acquaintance with the reports of *Charles Robinson* is confined almost exclusively to Doctors' Commons. During the forty years of European peace which England enjoyed after the battle of Waterloo, few questions came before our Admiralty Court of greater interest than claims of salvage or collision; but during the Russian war Dr. Lushington was called upon to decide questions on the rights of belligerents of the same nature as those which occupied Lord Stowell during the great French war; and, since the business of the Admiralty Court is now open to the whole Bar, any practising lawyer may be called on to take part in the decision of similar questions. To this feeling we attribute the increased attention paid to nautical and international law which has led to the present and other recent publications.

Two-thirds, however, of the book are devoted to cases on Mercantile law, and treat chiefly of the law of maritime insurance and general average, of partnership as regards the rights of the parties concerned on the bankruptcy or dissolution of the firm, with some other points connected with the law of bankruptcy, and of the nature and incidents of the right of property in personal chattels, and the modes by which it can be transferred.

A long note is appended to the report of the well-known case of *Joy v. Campbell*, which contains the most complete collection with which we are acquainted of the recent decisions on the law of reputed ownership. We are glad to see that Mr. Tudor places in a prominent position, at the commencement of this note, a statement of the case of *Stansfield v. Cubitt*, 2 De G. & Jo. 222, with an extract from the judgment of Lord Justice Turner, where his lordship points out that the registration of a bill of sale under the recent statute (17 & 18 Vict., c. 36) gives it no new validity. We notice this because the point has always appeared to us extremely clear; while, as far as we can judge, a vague notion to the contrary effect seems to have been widely spread through the profession.

But a collection of decisions, however complete, is not all that we have been led to look for in this volume. The example of its predecessors induced us to expect that we should find not only the names of cases arranged under proper heads, with extracts from the judgments delivered in the more important instances; but also that the general effect of each class of cases should be briefly and accurately summed up, so as to enable the practitioner to see at once what is settled law, and what are points on which a conflict of opinion still exists. We must say that, in this respect, the present volume falls far short, not only of the *Leading Cases in Equity*, but even of the volume on *Real Property Law*. We do not look for the ability of Mr. J. W. Smith in every writer on law, for probably no writer in any profession ever gained for himself so high a reputation in so short a time;¹ but we think that if our readers will compare the note to *Don v. Lippman* (Lea. Ca. in Merc. Law, pp. 227-257), or that to *The Case of Market Overt* (Ibid. pp. 603-621), with the note to *Ellison v. Ellison* (1 Lea. Ca. in Eq., pp. 208-234), or that to *Boraston's Case* (Lea. Ca. in Real Property, pp. 678-690), they

¹ Not only the *Leading Cases*, but also the *Mercantile Law*, the *Law of Contracts*, the *Landlord and Tenant*, and the *Action at Law*, have all been recently edited, and are familiar to all our readers. We do not know whether the fact can be accounted for; but the *Landlord and Tenant* has always seemed to us remarkably inferior to the other works just mentioned.

will perceive that the later volume fails to fulfil the promise of its predecessors.

We are inclined to attribute the defects which we have noticed to over haste in publication; in fact, the time which has elapsed since the appearance of Mr. Tudor's last great work is so short, that no care and industry could ensure freedom from mistakes and oversights in so large a volume as that now before us. This hastiness appears to have extended even to the correction of the proof-sheets; for, in spite of a tolerably ample table of corrigenda, we find (p. 463) reference made to "the 67th section of 12 and 13 Vic., c. 106, section 67," followed in the same page by another reference to the same section as "the 67th section of 12 and 13 Vic., c. 67."¹ Many other such marks of carelessness are scattered through the book; but they can hardly mislead any reader, and are therefore of little importance, except as marks of carelessness. It is a more serious blunder that, in discussing the liabilities of partners after a dissolution by death, the word "surviving" is printed (p. 317, column 1, l. 17) where "deceased" is meant: here, as the reader proceeds with the sentence, he will become aware that there is something wrong, and probably but little consideration will be necessary to enable him to detect what correction is required. It is hard that any such riddle should be proposed to him, at a moment perhaps when time is precious; but nothing short of a reference to the original report in Meeson and Welsby will show that it is to the plaintiffs, who were the vendors, that the pronoun "they" (p. 424, col. 2, l. 13) refers. In this case, the two plural nouns, "goods" and "assignees," have occurred in the earlier part of the sentence; and there is nothing on the face of it absurd in supposing the plural pronoun to refer to the latter of these. In a discussion like that in the note to *Joy v. Campbell*, the phrases, "true owner" and "reputed owner," frequently occur; and we know that such cases of recurrence call for much care in the correction of the proof sheets; but why is not that care given? In p. 436, col. 1, l. 3 from bottom, we have "reputed" instead of "true;" the

¹ This is mentioned among the corrigenda: "For 67 read 106."

consequence is, that the sentence expresses only half of what was intended, even if the reader do not derive a positively erroneous impression from an unconscious application of the maxim, that if one thing is expressed, its contrary is excluded.

We will now mention one or two instances of blemishes which can in no way be attributed to haste in the correction of proofs. Thus, on p. 413, we have *Simmons v. Bailey*, 16 M. and W. 838, cited to prove that chattels settled on a married woman, for her separate use, cannot be sold under the bankruptcy of her husband, "because the trustees, by allowing the wife to be in possession of the goods and chattels, do not thereby consent to their being in the possession, order, or disposition of her husband." This is of course quite right, and is of considerable importance; but it surely assumes the proposition, that the trustees of chattels, the subject of a settlement are the true owners of the chattels, within the reputed ownership clause of the Bankrupt Act. Yet we do not find this proposition stated until we have passed over ten pages; and then, on p. 423, we find *Ex parte Dale*, Buck, 365, quoted in proof of it, together with the passage in which Mr. Lewin expresses his opinion that this case was wrongly decided: the proper arrangement would have been to have stated the doctrine in *Ex parte Dale*, in the first place, and then to have quoted *Simmons v. Bailey* as establishing a distinction upon this doctrine.

The following sentence, p. 463, bottom of first column, appears self-contradictory. "The Bankrupt Act, which relates to conveyances or transfers by traders, is *more* extensive than the statute of Elizabeth," 13 Eliz., cap. 5., "which relates to conveyances and transfers by debtors generally, independently of the fact whether they are traders or not." Many readers would incline to say at once, that *more* must be printed in error for *less*; but on attentive examination it will be discovered that the writer means that the Bankrupt Act makes void a more extensive class of conveyances than are affected by the statute of Elizabeth, although the class of persons embraced in it is less extensive. We would submit, however, that each sentence in a scientific work

ought to be good on the face of it; it ought not to contain subsidiary clauses, which suggest, if they do not state, something as a reason for the principal proposition, which reason goes to prove the contradictory. No doubt, *Utile per inutile non vitiatur*, is a maxim of sound sense; but it is hard to compel a conveyancer to have recourse to the nice rules of special pleading to enable him to understand his text-books.

After all, however, the main value of the notes consists in the collection and abridgment of cases which they contain: the marks of haste to which we have referred, though we are sorry to find them, yet do not detract from the substantial value of the work. Its subject is one of interest to all branches of the profession, to all barristers practising either common law or equity, and to all solicitors. Moreover, it is well known that any work on mercantile or maritime law is welcomed by a large class who are glad of assistance and guidance in the management of their business, and who prefer to acquire the requisite knowledge for themselves, rather than to have constant recourse to their legal advisers, or to trust merely to the rules which experience alone may have taught them; all these will be glad that Mr. Tudor's book has brought before them a great quantity of law of daily practical importance, which is not to be found in the well-known work on Mercantile Law by Mr. J. W. Smith. We have no doubt, therefore, that we shall before long see an advertisement of Tudor's *Leading Cases in Mercantile Law*; second edition, with additions, and—as we hope and suggest—corrections.

ART. VI.—CAUSES CÉLÈBRES.

(No. II).—THE WATCHMAN OF ELDAGSEN.

IN Eldagsen, a small town in Hanover, was living in the early part of 1854 one Hartmann, an excise collector, with his wife. They had been married some fourteen years, but none of their four children had survived to the period we are speaking of. In February of the year just mentioned, Mrs. Hartmann was again expecting to be brought to bed of another child. Her stepson, a youth of nineteen years, was not at the time residing with them, and the household consisted only of themselves and one servant, a decent and reputable girl of about seventeen years of age.

On the 16th February, 1854, Hartmann left home for the purpose of getting change for some gold. This was about seven o'clock. His wife was lying on the sofa, a lamp was on the table beside her, and the servant was clearing away the supper as usual. As Hartmann went out, a few kindly words passed between himself and his wife, whom he was never again to see alive.

The evening was gloomy, with snow falling, as Hartmann, wrapping himself in his cloak, hurried down the street to the house of a Mr. Meyer, where he remained longer than he had intended. He heard, indeed, the watchman's evening horn blowing, which is sounded at nine, and is repeated on the rounds every hour. He set out from Meyer's house about half-past nine. On his return, looking through the window, he did not see his wife on the sofa. He called to the servant. Obtaining no reply, he opened the door, and found the girl lying on the floor covered with blood, and, as he supposed, in a fit, to which she was subject. He sought in vain his wife in the inner room. Horror-stricken,

* No. I. appeared in 8 L. M. & R., p. 12 (Nov. 1859.)

he shouted for help. A neighbour and his daughter hastened to his assistance, and with the aid of a light the unhappy wife was found on the floor, bathed in blood, between the sofa and the table. In the mean time other people arrived, who deemed it necessary forthwith to take Hartmann away from the horrible scene, as he had fallen into a state of distraction, in which he remained for many weeks.

The two women had been cruelly murdered; their skulls were fractured and their throats cut, but no marks of blood or hard struggling were found spread on the floor. The doors in the house stood open, but the bureau in the sitting-room had been forced. The private box of Hartmann, which he said contained some hundreds of dollars as well as the trinkets and ornaments of his wife, was gone.

When the surgeon who was called in appeared, he found the corpses cold and stiff. The blows and the wounds on both the women were alike of a mortal description.

The police authorities made a close examination of the house and neighbourhood. There were no traces of the murderer, but a visitation to the houses of suspected people was immediately entered on. Amongst others, Ziegenmeyer (a baker) and Busse (a mason) were called on. These had supped together, and had been out in company this evening. They were, however, though strongly suspected, not then taken into custody; but the opposite neighbour of Busse was set to watch him, and his observation of the conduct of the suspected man resulted in his report, that twice in the same night a light was kindled, and twice had some one gone up and down stairs, and that the wife, next morning, had been observed to "wring her hands over her head, and then let them fall on her lap *as if* she was in grief and agitation." Herrmann, a police agent from Hanover, arrived at the spot the next day, set on foot inquiries, and undertook the investigation. He examined, amongst others, the two men Ziegenmeyer and Busse, with respect to their doings on the night of the murder: Ziegenmeyer gave, in a hurried and embarrassed fashion, his account of himself, which created in Herrmann's mind a strong

suspicion of the man. A discrepancy in their statements was perceived. The former deposed that after supper he had gone straight to the house of a notary in the town, to speak about a lawsuit, and the other man declared that he had remained with his friend in his house till nine o'clock. In Busse's house was found a hammer, one point of which appeared to have been very lately thrust into the fire, "*as if* to remove any marks on it;" but there still remained a dark stain, which was clearly perceptible. Besides these facts, nothing further tending to criminate either of the men was discovered, though their clothes—their ordinary dress, which they had worn on the evening in question—were examined; nor could any thing conclusive be drawn from the facts discovered. And now suspicion for the moment was directed by the town talk to others. It was whispered that Hartmann himself was the guilty man, and that the wench was pregnant by him; and many other opinions were expressed, but equally groundless and vain.

The mystery was still unsolved, when, on the 17th March, Busse and Ziegenmeyer were again arrested on new information, under the following circumstances:—It appeared that a man named Wild had been appointed, three days after the murder, as a watchman¹ in Eldagsen. It was made his especial duty to exercise surveillance over the house of Busse and Ziegenmeyer. On the 13th March, a month after the event had occurred, this man deposed before the burgomaster, that at seven o'clock on the evening of the murder, he had left home and had reached Hartmann's house, and was on the opposite side of the road when he saw the two suspected men advancing towards him. He saw them suddenly before him, and he had an opportunity of seeing that they had not been walking on the road on either side of the house just previous to their appearance. When asked why he had not made this communication earlier, he replied he

(1) *Stillewächter*.—His duty was to watch at night, *without* making a noise with a horn to inform ill-doers of his approach. The horn-blowing police carried on their duties much after the fashion of the old London watchmen, and with probably the same happy result, that of protecting *themselves* at least from contact with robbers.

was afraid so to do until he was invested with the official character of constable. He added that, whenever Busse met him, he made threatening gestures at him. Official inquiries as to character were made, and it was reputed that Wild was a very correct and creditable man, while the accused were in bad repute, and had been engaged in no work during the winter, and must, therefore, have obtained their living by other means. On further examination, Wild repeated his statement with additional particulars. Moreover, a man of the name of Müller deposed, that on the 15th February he had remarked Busse prowling in the neighbourhood of Hartmann's house. And one Schwaize alleged, that at seven o'clock on the night of the murder, he had seen the two men in company leaving Ziegenmeyer's house. These facts were held as accumulating important evidence against the two suspected men.

The town had now become full of fear, and resorted to various superstitious practices with a view to solve the mystery.

The lower classes had recourse to the divinations of the "Key and Hymn-book." Widow Haller, the mother-in-law of Wild, was especially expert in this art. The book is, according to this ancient and valuable mode of incantation, set a-swinging, with the key tied inside it on a particular song of prayer or praise, and interrogations are administered to it as to names and circumstances, to which it vouchsafes answers by regulating its motion in accordance to prescribed rules. This valuable auxiliary to criminal procedure, we may observe, might, with spirit-rapping and table inspiration, be introduced perhaps into some of the continental courts of justice with at least as good an effect as certain other parts of their judicial system; and in England we suspect it would be an equally appropriate court of criminal appeal as that of newspaper editors and correspondents, which we have recently seen constituted after a late conviction for poisoning. It is interesting to know that the book-appeal convicted Busse and Ziegenmeyer, just as the newspaper appeal lately acquitted Smethurst. The popular voice in Eldagsen, indeed, universally condemned the two men. The government

had offered 100 dollars reward on the conviction of the murderers, and the following communications were made in consequence :—

1. Busse is a terror to the neighbourhood.
2. Busse was some years since apprehended for stealing oats.
3. Busse was once suspected, with regard to a widow found drowned.
4. Likewise, in 1853, with relation to some trees on the roadside.
5. Busse's wife had been seen to hold a great consultation with her husband the night after the murder, and no one could make out why.

One or two more circumstances of equal importance were elicited, thus—that he was forty-nine years old, and had been, moreover, many years before, sentenced to be imprisoned for eight months for theft ; whilst Ziegenmeyer was thirty-five years of age, and had NOT been convicted.

On March 17, these men being again taken into custody, further inquisition into how they had spent their time elicited no incriminating facts so far as can be seen, except that they had been in company that evening. It was thought worthy of record, however, that Busse had sought to borrow money for Ziegenmeyer ; and that, after he had been drinking schnaps, he introduced himself to a friend with “ Here comes the murderer ! ”

Wild not only adhered to his identifying the two men on the night in question, and described the dress, but now added this further statement,—“ The night following the murder I was taking my rounds, and went under the bed-room window of Ziegenmeyer and his wife, and heard them talking of money ; and the former said quite distinctly within the hearing of the witness, that he (Ziegenmeyer) had settled the wench, and Busse the woman ; and that the woman had kicked and had a pitiable death.” This confession was conclusive, if true ; and the next step taken was to investigate out the reputation still more closely of the parties, and so to discover the *probabilities*. The magistrates gave an indifferent character to Ziegenmeyer. He owned a few acres of land, but these were mortgaged for £200. The

clergy had but a bad impression of him, through his indifferent character and his non-attendance at church. Whilst of Wild, it was reported that he was a very correct person, a *good church-going man*, and attended service and communion with laudable assiduity, and was much respected. This testimony to Wild's character was all the more essential, as his evidence had been tendered bit by bit, and was not very connected, but, indeed, vacillating. His evidence with regard to Busse's dress seemed incorrect; nor did the police fail to observe, that no marks of blood nor the possession of deadly weapons could be traced home to the accused.

About a fortnight after the second apprehension of these men, a curious piece of evidence, characteristic of the German procedure in criminal cases, was brought forward. Ziegenmeyer's little daughter, four years old, was heard telling a story to her companions about the murder. She said, "Busse killed the mistress, and father killed the maid;" and she added further, when interrogated by a neighbouring gossip—"Father and Busse brought home 100 white dollars; father had blood on his boots, which mother wiped off; and Busse's sleeve was covered with blood." Upon which the child's mother slapped her, and bade her hold her chatter. But, in the mean time, doubts were thrown on Wild's evidence, as it was alleged that, on the night of the murder, he had been ill at home, and it was not probable he could have been in the street as he alleged; but no great weight seems to have been attached to this point.

On the 20th June, another witness (Möller) was brought forward, who deposed that he had gone to Ziegenmeyer's wife and pretended he knew all about the murder; she had confessed that "Busse had done the deed, and, if her husband was implicated, the former had seduced him to the act." She gave, however, a very different version of the conversation, alleging that Möller had come to her and said, "He knew all about it, and unless she would yield to his lust he would inform against her husband." She had, however, rejected his advances, and said, "If her husband was guilty, let them punish him."

In the following October the proceedings were ripe to be laid before the various courts before which such criminal proceedings must pass ; and a difference of opinion was found to exist in the judgment of one section. The case was incomplete, and the prosecution was recommended only to be dropped. Another division of the functionaries came to an opposite conclusion, and the result was, that directions were given to prosecute the two prisoners for the murder, as well as to investigate another charge of robbery on one Topp, which had been also laid against them. The evidence, of which we have already given a sketch, was investigated with additional detail, involving much hearsay evidence, many contradictions as to time, dress, and other circumstances connected with the prisoners, and also tending to inculcate others. For example, a Mrs. Buddensiek deposed that she had invited Busse, as soon as she heard of the murder, to walk up with her to Hartmann's house and see the corpses ; but he refused, and lay down in bed again, saying he could not bear to see such things, which Mrs. Buddensiek thought very odd, as Busse was fond of seeing what was curious and strange. But it was thought, at the same time, a very suspicious circumstance against Ziegenmeyer, that *he* had run off immediately to Hartmann's house when he heard of the murder. Every thing that anybody in Eldagsen had said, thought, or supposed with relation to the murder, was considered in evidence ; and on the 18th November, 1854, the court laid a formal information against the prisoners for the murder of Mrs. Hartmann and her servant ; and for the theft of some goods of one Topp ; and against the prisoners' wives as accessaries to the murder.

On 7th December, 1854, the charges were opened before a jury of twelve sworn assessors, comprising three lawyers, four merchants, one tradesman, two landowners, one hotel-keeper, one postmaster, and one land agent. Several new witnesses were now called to speak as to the hour when the murder must have taken place.

One Wollenweber heard, at a quarter to eight, cries of agony issuing from Hartmann's house ; and that this was the exact

period of the murder seemed substantiated. Mrs. Klammroth was quite clear (and her evidence was corroborated by others) that Busse and Ziegenmeyer came home together to Busse's house *between* half-past seven and a quarter to eight. That Busse wore then a light grey jacket, five witnesses deponed.

When the chief witness Wild gave evidence, the official report declared that it was not ready, connected, or consistent. Thus his first statement was, that he had been going his rounds as watchman the night next after the murder (17th February), and had *then* heard the admission of Ziegenmeyer under his window. Whereas, in fact, he *was not appointed* watchman till the 22nd February. He then fixed three or four days later for the occasion, and eventually the twelfth day after the murder. He then declared his earlier statements had been misunderstood, but this he failed to render obvious to the court. He affirmed also, stoutly, that though it was a dark night he could identify the men with certainty; and that Busse had on a blue smock. It was also made a question whether Wild had really been out at all on the particular night of the murder; and it did not appear that he had narrated any thing of what he had seen and heard even to his wife.

The court, however, gave ear, it would seem, to evidence of remarks made by Mr. Hartmann, to the effect, that if the affair had happened some years since he would have married again; and attempts were made to criminate him either as a conspirator with the two accused, or independently. But, although all this was good illustration of what people will say when their suspicions are excited, and their loose tongues allowed free play, it came to nothing on being considered.

Without Wild's and Möller's evidence, there was little ground even for suspecting the two accused men; but it was urged that three courts¹ had agreed on their guilt, and on submitting the evidence to the jury.

The president of the court eventually left to them the question

¹ Viz.:—The Staatsanwaltschaft, the Rathskammer, and the Anklagekammer.

whether Busse and Ziegenmeyer were guilty or no. After long discussion they returned a verdict of guilty, and the sentence of the court condemned the prisoners to death.¹

Ziegenmeyer was horror-stricken at the verdict and sentence. He sent to his advocate the same evening, and solemnly protested his innocence, but was assured there was no prospect of escape. The next morning he was found hanged in his cell.

Busse more calmly or doggedly awaited his fate, but the sentence was not, however, immediately carried out. To him was graciously accorded, on 18th February, 1855, the doom of perpetual imprisonment in chains, which was to be embittered by his being, on the 15th and 16th February in each year (the anniversary of the murder), consigned to a dark dungeon. He once more saw his wife, and bade her be of good cheer, for he would yet be free. Ziegenmeyer's property was sold, and his wife and children turned out into the world to beg or starve. And so the good people of Eldagsen were satisfied, and justice was vindicated, and the tragedy was thought to have been played out. The gossip and rumours which had been turned into evidence—the prejudice and suspicion which had been elevated to the dignity of legal testimony—had now done their work. The suicide of the one convict was accepted as proof of conscious crime, the persistent resolution of the other, as the hardihood of a confirmed villain.

The neighbourhood of Eldagsen, however, was not destined to remain free from further outrage. It happened that at Weetzen, a village not far from Hanover, lived an aged captain of the name of Gotz, no longer in the service. He had recently married the young widow of the owner of some landed property. She was reputed to be well off, and she and her husband lived on the estate. On 1st September, 1855, the couple had retired to rest for the night, but the lady was ill, and could get no sleep. About twelve o'clock the husband had risen to attend to his

¹ The penalty for this crime was more severe in its character than common execution, for the convict was to be dragged to execution on a cow-hide !

wife, and then, putting out the light, they once more returned to bed and fell asleep. Suddenly the wife awoke with the sensation of receiving a violent blow on her head. Jumping up she received another on her face, but was able to reach the next room, when she seized the bell and rung violently, and then fell senseless to the ground. Her husband was likewise struck on the head violently. The servants, hearing the alarm, rushed to help, and a doctor was fetched.

On searching the room, an axe was found covered with blood. Neither of the wounded people had seen any thing, but they thought, until the axe was found, that they had been struck by a stone cast at them through the window. Some one had, however, certainly been in the room, and escaped by the window, which was broken. For a fortnight Madame Gotz was in great danger, nor was it till ten weeks had elapsed that she became convalescent.

Suspicion soon fell on a certain man of the name of Bruns, a discharged servant of Mr. Gotz. There were traces of blood on a bough of the tree, which the assassin had grasped in his descent from the window. The foot-tracks led to the high-road. Bruns had been with a girl to whom he was affianced on the evening in question, and who lived in Gehrden hard by, but he was at home between seven and eight in the afternoon, and had been seen in bed at half-past five the next morning. Though this looked *prima facie* like an *alibi*, the police agent Herrmann, who it will be recollected had been active in the prosecution of Busse and Ziegenmeyer, still had his suspicions. On the 2nd September he therefore repaired to his house, and noticed first of all a wound on the hand of Bruns, which the latter accounted for by a very credible explanation. Herrmann, therefore, had recourse to a professional expedient. Unobserved he placed the axe in the room, and then casually asked the parents of Bruns whose axe this was. Each claimed it as belonging to themselves; and, moreover, the father declared that this axe, which was generally in his own room, was, on this night, taken into his son's. Bruns was

thereupon taken into custody, and he admitted that on the night of the outrage he had visited his betrothed. He was taken to Hanover by Herrmann, who, on his road, managed to make a piece of evidence thought worthy of record in these proceedings. He exclaimed, "Good heaven, what must be your feelings!" to which the *prisoner answered nothing, but sighed!* On 3rd September, Bruns, however, broke silence, and confessed, it was alleged, that out of revenge he had assaulted the unfortunate couple, but declared he had had at first only the intention of breaking their windows.

In Herrmann's mind another idea had been excited. The nature of the crime, and the character of the wounds, impressed him with the notion that the same man, and the same weapon, engaged in the act at Weetzen had done the deed at Eldagsen. He had entertained doubts and mental discomfort about the conviction of the other two men, in which he felt he had taken too active a part, and he resolved to sift the case to the bottom. He therefore set off to find Louisa Sprengel, the betrothed of Bruns; and lo, in her ears *were the rings of the murdered Mrs. Hartmann!* This led to further search, and other of the poor exciseman's wife's trinkets were, in spite of the denial of their possession, found in Louisa's lodgings. She acknowledged that Bruns had given her these things, and Herrmann, thus confirmed in his belief, hid him once more to Bruns' house, and there found the metal box in which Mrs. Hartmann was wont to keep her valuables, and which had been stolen at the time of her murder. This evidence was forthwith brought before Bruns by the police-officer, who asked him to explain these circumstances. This he did by alleging that he bought the trinkets at Eldagsen, except one which had been given him by a girl to whom he had been previously engaged. He said he never had a metal box as described at all. When it was shown him, however, he was struck dumb, but still would not confess.

Expedients were therefore resorted to by the police authorities to obtain a confession; and we may here observe that the English rules of protecting the accused against making admissions of guilt,

may seem theoretically absurd, and occasionally may preserve villains from meeting their due punishment, yet, in the proceedings here narrated, the moral and legal inconveniences of trapping even the guilty into a confession to be used on the trial, instead of proofs, are notably illustrated.

A fellow-prisoner of Bruns, Wolfersdorff, was employed to induce Bruns to make a clean breast, and on 6th September gave information that he had succeeded—a statement, the truth of which the authorities had the strongest reasons afterwards to doubt. Whereupon a police constable, Brüdern, was introduced to perfect the arrangement. He pretended that he was come to keep watch over Wolfersdorff, but presently began to narrate how a certain man of the name of Bruns was said to have after all committed the Eldagsen murder. Bruns trembled—his companion then proceeded to dwell on poor Ziegenmeyer's fate, and that of his unhappy children begging their bread. He further encouraged Bruns to confide his griefs to him, and so wrought on him that, seizing the crafty policeman's hand, he confessed, as Brüdern declared, every thing. As Brüdern next morning left the prison, Bruns besought him to procure for him a clergyman.

On the 7th September, Bruns made ample confession before the sitting magistrate, which was to the following effect:—On the evening before the murder of the Hartmanns, on the 15th February, he had gone to their house to buy a stamped paper, in order to use it for an agreement with Götz. The next day, as he passed the house, the thought struck him "that something was to be got there." He knew that the collector's cash-box would at that time of the month be full; and he thought it would be found in the back room. He sought to enter by the back door; failing in this, he cautiously opened the front door. He had then looked into the room on the left hand. He found it so dark that he was about to seek a light in the kitchen, when the reflection from the opposite house enabled him to dispense therewith. In searching for the candle, however, he had found a hatchet, and taking this he again repaired to the ground-floor. He here met the serving-girl with a light in her hand. She recognised him, as she stepped

back into the room, as "the man who was there last night," and set the light down on the table immediately. He instantly rushed behind her, and struck her with the weapon on her head, so that she fell speechless to the ground. Then, for the first time, he observed Mrs. Hartmann, who was rising from the sofa, probably with the intention of leaving the room. At her also he immediately aimed so deadly a blow that she dropped without a word. He then proceeded to rifle the bureau with the aid of the instrument in his hand. After completing his theft, he observed his victims stir somewhat, though he heard no sound from their mouths; upon which he grasped a knife, and cut the throats of both the women. Now a horror seized upon his mind, and he threw away the hatchet in the house, and the knife into the street, washed his hands in the brook, and reached home safely.

It is worthy of note, that at this period Bruns was in service with a person of the name of Jasper; and being much trusted, he was, after the murder, especially engaged in the house to protect the females, and in the evening was wont to take his place in their sitting-room for that purpose.

After this confession before the sitting magistrate, the man became deeply affected, wept, and begged for a clergyman. He felt, said he, his conscience unburdened, now that he had told the whole truth. He saw how great a sinner he was, and he repented bitterly. It is, however, a curious fact, but one not rarely recognised in the mental condition of men like Bruns, that at this very moment he was mis-stating and keeping back a part of the truth. In what respect he was attempting to deceive we shall presently see. Again, as regards the Weetzen outrage, it is extremely improbable that he was acknowledging the truth, though he never would vary his statement. When appealed to with respect to this latter outrage, he, a man whose life was already forfeited, and who therefore should have had no object any longer in denying the facts connected with the affair, had it pressed upon him, that his taking with him to the house of Götz the deadly instrument, and his using it in an analogous, though happily not so successful, a fashion as at Eldagsen, were very suspicious circumstances; but he replied that,

although appearances were against him, he must persist that neither theft nor murder had then been his object, but to break his old master's window out of revenge. When the priest came, Bruns, on his knees, again repeated the whole narrative above given.

A witness, moreover, at the time turned up, who had seen the trinkets which Bruns had subsequently given to his second lover, formerly in the possession of the first. Wild, too, the main witness against Busse and Ziegenmeyer, had now fallen into discredit with the authorities, for (*inter alia*) claiming the blood-money, which he had previously renounced lest his veracity should be thereby impeached.

Turning for one moment to the fate of the convict Busse, we should record that on the 12th December the State Department received a petition from him, being then in prison at Lüneberg, in which he prayed that six witnesses therein named might be examined, whose testimony would certainly bring him back once more to freedom; and further, indeed, he urged that the evidence already given, which had been mistaken by the courts, might be reconsidered. He added, "My weakness is too great here to enter upon these points." On 2nd January, 1856, Busse's petition was taken in hand. He showed how his pastor's evidence in criminalising his religious character, and the burgomaster's in disparaging his industrious habits, were false, and the other witnesses' testimony tended to bear out his exculpation. It still was needful, however, in order to satisfy justice, notwithstanding the confession of Bruns, to be clear that the latter had *alone* committed the murders.

Bruns was therefore indicted, and put on his trial for these murders, *either* in conspiracy with others or alone; and also for assaulting and wounding Götz and his wife, on 1st September, 1855.

On the 26th March, 1856, two years therefore from the time of the Eldagsen murder, Bruns was brought to trial, and to the astonishment of all, when called on to plead, *pleaded not guilty*. He alleged that he had been pressed and forced into his confessions, which were not true—that the trinkets and ornaments

found in the possession of his betrothed he had found about Easter, 1854, before the house of Mr. Hille, in the upper town of Eldagsen, wrapped up in a blue paper. He thought they belonged to a woman passing on just before him; and he responded, in his examination, in other particulars plainly enough. As to the threats employed, though the *magistrate*, who first investigated the case, certainly had not used them, yet Bruns thought he must stand by what he had said under the pressure of Herrmann the constable.

The truth of this allegation of the prisoner was of vital importance, and the court had to enter upon the inquiry. Both Brüdern and the turnkey, Wortmann, denied the charge of undue pressure having been exercised towards the prisoner, but their conduct seemed open to grave suspicion; whilst that of the policeman, Brüdern, was certainly even less free from doubt; and there was good reason to doubt the credit of Wolfersdorff, which had indeed been too readily accorded. For example, one of the alleged points of confession was, that Bruns stated that when he had bought the stamp, Hartmann had put the groschen with the rest of the money; whereas Hartmann recollected that the coins being from the Brunswick mint, he had actually put them in his pocket, and not deposited them with the rest of the tax-money. There was no reason why Bruns should have invented such a minute falsehood; but it was a likely piece of small evidence to be forged by a lying witness. Further, it was clear that the first day *after* the confession Bruns actually had been immediately relieved of part of the prison discipline—that of the strait-jacket.

On the other hand, the confession was of a very detailed and close description. The prisoner accounted for this by saying, that his acquaintance with the depositions on the former trials had enabled him to supply the minutiae. The fact, *e. g.*, of the light thrown into the kitchen from the opposite house was tested by experiment; and the finding a hatchet in the kitchen was thought an important and corroborative fact. Traces of blood had also been noticed on the hatchet when first found, which was deemed an important fact, notwithstanding that it also appeared that the instrument had been also used for cutting off ducks.

heads, and the marks in question were very old. It seemed, moreover, that Bruns had been flush of money; but no one had observed in him the least change of demeanour during the exciting time of the murder and its investigation.

The probabilities on the whole evidence had now to be considered by the jury, and they returned eventually the verdict of **GUILTY** against him; and he was condemned to be executed, just as poor Busse and Ziegenmeyer had been condemned a twelve-month before.

When all hope had vanished from him, he again resolved to make a full confession, which differed in certain respects from the former one, and by no means justified all the conjectures and inferences which, in the course of his trial, his judges made with respect to certain facts. So dangerous in criminal trials is the habit of drawing on the speculations of the probable, instead of accepting the facts only which are proved, and their necessary consequences. In the former confession Bruns had told how he had gone down to the kitchen for a light, which he could not find, and how the reflection from the neighbour's house had answered his purpose. This, he now acknowledged, was mere invention on his part; so, too, the detail about his finding in the kitchen the hatchet which he had used for the purpose of the murder, was a fiction. "I gave," he now admitted, "a wrong account of the hatchet in order to screen myself to some extent. I washed my hands," he continued in this last confession, "with my handkerchief; I threw it away, and I have often wondered that it was never found. I got home at the latest at a quarter past eight. There was only a little blood on my nails, which I washed off next morning. On the back of the hatchet there was also blood, which I wiped away easily. I put the hatchet on the evening after the murder into the kennel, and next morning brought it again into the stable. Though I had a pocket-knife with me, I did not use it to cut the woman's throat, but one which I found in the room, and which I afterwards threw away." He added other particulars which, being of no particular interest, we, for sake of brevity, will not attempt to recount.

We may add, however, that he exonerated Busse entirely; and further declared that it was not want or poverty which drove himself to commit the horrid deed.

The next act in this judicial tragedy sees *both* the unfortunate convicts, Busse and the confessed murderer Bruns, once more before the court. *Both* were now again put on their trial according to the cumbrous and self-stultifying proceedings of the country. Busse, with his tall, well-knit figure—fixed eye, glancing from under his bushy brows—his black hair thinned by his dungeon life, which seemed, moreover, to have somewhat broken his defiant attitude; Bruns, small and fair,¹ carefully dressed and arrayed. He never moved his eyes from the judge, but exhibited throughout the greatest intelligence and acuteness. And there also, on the table, between the jury and the prisoners, lay the two skulls of the unhappy murdered women—sight terrifying to the guilty conscience, and appealing, as it were, for justice at last. The head of the girl exhibited one great fracture, with the bone which had been broken away lying underneath. That of the woman lay split into two pieces. He adhered, however, to his confession, adding that, from his fright, he could not remember all the details of the ten or fifteen minutes during which he was in Hartmann's house.

What seemed to puzzle the court was the question, why Bruns had not prosecuted his robbery into the little room of Hartmann, where the chief plunder, viz., that of the excise money, was to be had. To the importunity of the judge on this point he aptly replied—"Mr. President, you may imagine the reason better than I can tell you. When one has placed himself in the position I had, he does not think much of money."

One cannot help suspecting, notwithstanding the confession, that the man took his own axe, and proceeded that night to the house with the preconceived intention of robbing, and murdering if need be, all who interfered with his project; and it is probable

¹ His profile is declared to have closely resembled Schiller's. To physiognomists must it be left to decide whether Bruns was or ought to have been a poet, and was lost to the world by misfortune, or Schiller ought to have been, and was in heart, a robber—a character his first play shows he well appreciated.

his visit the night before was with a similar purpose, which accident alone baffled. It seems improbable that, both at Eldagsen and Weetzen, this man should have his axe with him; and, going for the purpose of using it as a tool, he should be induced to use it as a weapon.

The exact time of the murder was supposed, on this occasion, to have been arrived at. It was about half-past seven when Wollenweber deposed to hearing frightful cries in the house; and he "remained there ten minutes till the sounds ceased." He said he thought the sound was of "the women who were trying to sing, but could not manage it;" but his imitation was like a groan.

On 23rd September, 1856, Bruns was convicted and condemned to death; Busse was acquitted.

The hard character of Bruns is illustrated by his bearing during the trial. He could not forbear from saying in joke, that he had a right to exact a fee from the multitude who thronged to see him tried. Nor was his tranquillity disturbed except for the moment when the verdict was delivered. He remained till his execution perfectly at ease.

One curious circumstance may here be noticed. It seems that the poor murdered girl, a fortnight before she met her fate, had told a companion of a horrid dream she had had—that she and her mistress had been murdered in bed. Unfortunately for the dream, *two persons, a man and a woman*, were the murderers. Had this been left, like many cherished mysteries, unexplained, and if the murder had not been brought home to one man, it would have formed a valuable testimony to the virtue of prophetic dreams. It turned out, however, that she and her mistress had both been alarmed some days before the dream, by two suspicious, ill-looking faces peering through a window at them.

And now Wild was put on his trial for perjury. Not less than fifty-five witnesses were called. We cannot here follow the trial, in which is well exhibited the way in which his false evidence had been commenced, received, fostered, and perfected, its inconsistencies and improbabilities been overlooked and bolstered up, a

cruel conviction secured, and a judicial murder on Ziegenmeyer committed.

But we will here briefly review the evidence on which the innocent were found guilty. This was done on the occasion of Wild's trial, too late, alas ! for the ends of justice. Viewed by the light of the subsequent trial of Bruns, and his confession, the court could not help seeing how the truth had been perverted, and how the habit of leaning always against the accused had resulted in the monstrous verdict against Busse and Ziegenmeyer. Wild had sworn that, between half-past seven and three-quarters-past seven o'clock on the night of the murder, he had *seen* the two prisoners pass close by him. He recognized them by their voices, the one saying, "Would to heaven we were well out of this street!" and the other replying, "Hold your tongue." He had recognized their dress. Busse had on a blue smock—a proved untruth—the other a grey coat. Busse, too, he had marked clearly (though the night was dark) by his hand, *which had lost one finger!* Further, Wild stated this most improbable fact, that twelve, fourteen, or sixteen days after the murder, he had heard under the window Ziegenmeyer make his confession. He was, he afterwards swore, not clear whether Ziegenmeyer said this in his sleep or not. "I did not," said he, "impart this to the burgomaster, Sudendorf, till the 13th March, partly because I was afraid, and partly because one Baxmann had told me I dare not do so. I was not on good terms with Baxmann, but he several times tried to induce me to tell him all I knew about the murder. I never spoke to him about the reward, and it was another man, Helmke, who applied for it for me without my cognizance." The latter assertion was satisfactorily proved to be utterly false.

Sudendorf now declared, that on the first interview with Wild he had told him nothing about having overheard Ziegenmeyer's conversation; and, indeed, the hesitating and hypothetical way in which he had at first opened the conversation with Sudendorf was a remarkable circumstance, but not allowed to have any weight attached to it in favour of the accused. Herrmann deposed

that Wild had confided to him his evidence about recognizing the two men ; that he not only believed it, but was actually of opinion that Wild himself, by repeating the story himself, believed it. Herrmann also affirmed that, as to the rest of Wild's statement, he had come to the conclusion that it was the man's invention, and this shook his belief in any of his statements. *When* he came to this conclusion is not made clear, nor is it worth much. The idea of a *diseased fancy* in Wild could not be entertained ; medical testimony on this head overthrew the theory.

The magistrates before whom the first charge was heard, observed that Wild was uncertain and varying in all his evidence, except that of having met the two men in the street as mentioned.

Baxmann swore that, when in talk with Wild, he had thrown doubt on Wild's evidence, who bade Baxmann be quiet and he should have half the reward. But Baxmann had not mentioned this fact before, because, said he, "no one had asked him about it."

Had Wild's testimony at the first been properly examined, and genuine statements only received from the witnesses, instead of the accumulation of gossip, and hearsay, and imaginary conversations, though the genius of German jurisprudence would have been outraged, the cruel injury perpetrated by Courts of Justice so called, would have been saved.

But the end of these trials had not yet arrived, owing to the technical rules of criminal law. The former trial, in which Bruns with Busse had been indicted, had to be repeated. On the trial of 7th April, 1856, the former had been tried and condemned to death. In the following September he was once more put on his trial *alone*, and again condemned to death. Being required as a witness on Wild's trial for perjury in October, Bruns was kept alive for this purpose, and again had to give his oft-repeated account of the matter. This was the third occasion he had to detail his horrible confession. He was then taken back to Hildesheim, where he remained many weeks waiting his execution.

At last, on 28th November, the sentence was carried out, and Bruns was beheaded on a hill in the neighbourhood of Hildesheim.

It was one of those disgusting exhibitions not uncommon in this form of capital punishment. He was actually hacked to death. Four blows were inflicted, and the last falling in a downward direction, severed the head from the trunk. Improving and civilizing scene! alike calculated to elevate the standard of humanity and lend dignity to the Law! It is recorded that, during his punishment, he received the consolations of religion with much edification, and wrote to his unhappy parents excellent and appropriate letters.

We might here end our account of these extraordinary proceedings, but we find in certain remarks of the learned editors¹ of the work to which we are indebted for the narrative, some passages which we think will be interesting to our readers at the present time—the more so that trial by jury,² as established in England, has of late been, we may almost say, itself put on its trial, and its imperfections freely canvassed. These observations may perhaps lead us to maintain the opinion that, whilst the institution in question is not *perfect*, the experience of the procedure of other countries, suggests the view that it is at least the *best possible* tribunal of which the present condition of society admits. The learned jurists who have prepared the history of this case, observe that it is incumbent upon them to inquire, *How it was possible* that justice should have so miscarried and so halted, and that the innocent should have been convicted of a capital offence? The old institutions of the Inquisition and the torture have often produced such consequences; but here, in modern Germany, the facts on which life and death depended were sifted by the *four* divisions or offices of justice. 1st, By the Examining Magistrates. 2nd, By the Chamber of Councillors. 3rd, By the Upper Court of Deputies. 4th, By the Impeachment Chamber.³

¹ Drs. Hitzig and Häring.

² The German editors affirm that, in England and North America, there are open associations formed, which bind their members never to give a verdict of "*guilty*" in capital cases. Surely, so far as England is concerned, they are misinformed. Isolated cases have occurred where jurymen have been so resolved; but the combination to break oaths, as suggested, is certainly unknown to us.

³ We render the technical term as well as we are able, but there are of course no institutions in England exactly corresponding to those in Hanover.

The proceedings are next laid before the jury, and finally, the High Court of Justice have a right of veto or appeal, in the event of the verdict of guilty. There are therefore $1 + 3 + 1 + 5 = 10$ professional men engaged on such proceedings. Ten jurists watching the course of justice, should generally preserve a prisoner from an unrighteous verdict. Yet the contrary is the fact. Von Arnim, when minister of justice in Prussia, was so horror-stricken with the discovery of the defective working of the system in his country, that he exerted himself to bring about a reform. Within his knowledge no less than *six innocent people had been condemned to death*, and only saved from their fate by lucky accident.—(See *Staats Lexicon*, von Rotteck and Welcker, IX. 52, Art. Jury.) Here at least it is observed, it is not the Institution of Jury which is to blame, for the learned jurists, as Welcker points out, are those to whom most of the blunders are referable, and the jury plays but an inconsiderable part in the trial. Besides, there is a common phrase which cannot be too strongly condemned, which is often addressed to the jury before whom the facts are at last brought, having been previously moulded, dealt with, and decided on by “learned men.” It is to the effect that “So many and such able state jurists have recognised the guilt of the accused, that you, gentlemen of the jury, can have but little difficulty in coming to the same safe conclusion.”

The mode of examination is the basis of all that is mischievous in the German procedure. It partakes of the nature of “cooking.” The courts are indeed committees of prosecution. No cross-examination as to the motives of the witnesses, and the grounds of their statements, is permitted, as in England. Again, when a witness for the prosecution, like Wild in the above case, breaks down, witnesses to *his* character are allowable, to reinstate his credit. Here Wild was held up as a good churchman and communicant! Further, hearsay evidence (when even the original testimony might have been had, if it was worth having) is recklessly entertained. Another egregious element for preventing justice, is the bringing up the whole history and supposed character of the accused, as affording probabilities of his capacity for

the particular crime laid to his charge. Such detail is sought for with the eye of suspicion, while there is great uncertainty which attends all investigations which belong to reputation, especially when the subject of the inquiries is not in a position to defend himself.

It is also well remarked that when suspicion has been generally directed against a man, the police follow the matter up, and are awake to all that weighs *against* the accused, but are blind to the counterbalancing evidence. "Trifles light as air" are so magnified and multiplied, that when they are brought before the court, shaped and coloured, they assume an importance and significance utterly disproportionate to their real value. Barren facts assume the form of pregnant fallacies, and an unjudicial imagination constructs an ingenious and delusive fabric on a rotten and incoherent base.

ART. VII.—*A Treatise on the Law of Partnership, including its application to Joint-Stock and other Companies.* By NATHANIEL LINDLEY, Esq., of the Middle Temple, Barrister-at-Law. In 2 vols. London: Maxwell, 1860.

IT might be supposed that with a new and elaborate work on the Law of Partnership before us—especially as this branch of jurisprudence is one of the most important administered in this great commercial country—it would be an easy task for us to write what would be interesting to our legal readers to peruse: we, however, do not so find it. First, because the law of private partnership contains little of what is not old and well-established law, to be studied in treatises and in the leading cases in our reports; and next, because so far as the partnership which exists in public companies is concerned, there is little new to be said in our pages, for we have often reiterated that the statutes are confused and anomalous. But lastly, we find it difficult to attempt an

essay on Mr. Lindley's work, because there is little to be said upon it, except that it is an excellent treatise, and that the law is well and clearly stated therein. Had it been otherwise—had it been an ambitious attempt, carelessly or imperfectly executed—one might, in protesting against the author's misfeasances, have been excused for proclaiming the law; whilst, with that condescension and kindness which distinguish all reviewers, one might have lamented over a brother's weakness and defects.

We have no doubt whatever that, to one fresh to the subject, Mr. Lindley's book might be made a peg for a law-reform article, wherein the law relating to Joint-Stock Companies might be again pilloried; but we are sick of it, and for the present, at least, refuse to distress ourselves or our readers with the well-known cries of disgust and prayers for amendment, with which, in common with every practical lawyer, we are wont to approach the subject. But, as an example of the ability and accuracy with which Mr. Lindley treats what is obscure and repulsive, and of the excellent method he adopts in stating the law as it is, and as we must learn it and practise it, we will select the following passages from the early pages of his first volume, on the "*Distinction between Partnerships, Corporations, and Companies.*"

"A corporation is a fictitious person, created by special authority, and endowed by that authority with a capacity to acquire rights and incur obligations, as a means to the end for the attainment of which the corporation is created. A corporation, it is true, consists of a number of individuals, but the rights and obligations of these individuals are not the rights and obligations of the fictitious person composed of them, nor are the rights and obligations of the body corporate exerciseable by or enforceable against the individual members thereof, either jointly or separately, but only collectively, as one fictitious whole. As the civilians neatly express it, *Si quid universitati debetur singulis non debetur, nec quod debet universitas singuli debent.*

"With partnerships the case is otherwise; the members of these do not form a collective whole, which is regarded as distinct from the individuals composing it; nor are they collectively en-

dowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners, and are enforceable by and against them individually; *Si quid societati debetur singulis debetur, et quod debet societas singuli debent.*

“It appears from the foregoing observations, that, in order to constitute a partnership, properly so called, it is requisite:—first, that there shall be two or more persons who have agreed that some business shall be carried on for their common profit; and, secondly, that the profits shall be shared amongst them, not as members of a body corporate, but merely as individuals who have entered into an agreement to that effect.

“One might stop here, and not attempt to carry the preceding analysis further, were it not that partnerships, in the sense now arrived at, are divisible into two classes, viz., Partnerships, commonly so called, and Companies.

“The fundamental distinction between these two is, that a partnership, commonly so called, consists of a few individuals known to each other, bound together by ties of friendship and mutual confidence, and who, therefore, are not at liberty without the consent of all to retire from the firm, and substitute other persons in their places; whilst a company consists of a large number of individuals, not necessarily acquainted with each other at all, so that it is a matter of comparative indifference whether changes amongst them are effected or not. Nearly all the differences which will hereafter be noticed as existing between ordinary partnerships and companies, will be found traceable to the above distinction. Indeed it may be said that the law of companies is composed of little else than the law of partnership, modified and adapted to the wants of a large and fluctuating number of members.

“The common law of this country does not recognise any distinction between large and small partnerships. At common law every association of persons formed for the sake of sharing profits, is either an ordinary partnership or a corporation; and a company, which is neither a corporation nor an ordinary partnership, is a

thing unknown to the common law of England. It has even been said that a large partnership, the shares in which are transferable without the assent of all the members, is illegal at common law; and although the better opinion seems to be that this is not so, still the courts treat as illegal any association for profit which attempts to arrogate to itself the privileges of a body corporate.

“But within the last century, indeed it may almost be said within the last half-century, associations unknown to the common law have struggled into existence, and after much opposition have become legal. These are commonly called companies. They are not pure partnerships, for their members are recognised as an aggregate body; nor are they pure corporations, for their members are more or less liable to contribute to the debts of the collective whole. Companies are associations of persons intermediate between corporations known to the common law, and ordinary partnerships, and partaking of the nature of both; and the law relating to companies depends as well on the principles which govern ordinary partnerships, as on those which are applicable to corporations strictly so called.

“Different Sorts of Companies:—

“Using the term joint-stock company in the sense of a partnership, the capital whereof is divided into shares transferable without the express consent of all the co-partners, all joint-stock companies, of which the law of England takes cognisance, will be found to belong to one or other of the following classes, viz.:—

“1. Mere partnerships with more members than usual. To this class belong all companies which do not belong to some one or other of the classes following.

“2. Partnerships governed by certain local customs which exclude those laws (applicable to partnerships generally) with which the customs are inconsistent. To this class belong Cost-Book Mining Companies.

“3. Partnerships privileged by the crown or legislature to sue

and be sued by a public officer. These companies are sometimes said to be *quasi* incorporated; they include Joint-Stock Banking Companies, governed by the Act of 7 Geo. IV., c. 46; Joint-Stock Companies governed by the Letters-Patent Act of 7 Will. IV., and 1 Vict., c. 73; and a number of Insurance and other Companies governed by special acts of their own.

“4. Corporations in the proper sense of the term, the members of which are to no extent liable to the debts of the body corporate. These must be created either by Royal Charter or by Act of Parliament, and to them the law of ordinary partnerships has little if any application.

“5. Partnerships incorporated by Royal Charter or Act of Parliament, but so, nevertheless, as to leave their members more or less liable to the debts of the whole body. Companies governed by the Companies' Clauses Consolidation Act, and Banking Companies governed by 7 & 8 Vict., c. 113, are types of this class.

“6. Partnerships incorporated by registration. These are of two sorts, according as the liability of the members for the debts of the body corporate is unlimited, or limited to the amount of the capital which they have undertaken to subscribe. The first sort includes the great mass of ordinary Joint-Stock Companies. It included all Joint-Stock Companies governed by the General Joint-Stock Companies Act of the 7 & 8 Vict., c. 110; and it includes all companies still governed by this last Act, or (unless limited) by the modern Acts of 1856, 1857, and 1858. The second sort included those companies which availed themselves of the short-lived Act of the 18 & 19 Vict., c. 93, and now includes those companies which are registered as Limited Companies under the Acts of 1856-8.

“The following table conveniently exhibits the above classes of companies :—

Joint-Stock Companies.	Unincorporated, viz.—	Large Partner- ships.	
		Cost-Book Min- ing Companies.	
	Incorporated by	Companies em- powered to sue and be sued by a public officer, including,	Banking Companies governed by 7 Geo. IV., c. 46.
			Companies governed by the Letters Patent Act. Companies having special Acts of their own.
		Special Act of Parliament, <i>e. g.</i> , Railway, Canal, Dock, and Water- works Companies,	In which the members are not liable to the debts of the Company.
		Royal Charter	In which the members are liable to the debts of the Company, <i>e. g.</i> , Banking Companies governed by 7 & 8 Vict., c. 113.
	Registration		Without limited liability. { Companies governed by 7 & 8 Vict., c. 110. Companies governed by the Joint- Stock Companies Acts of 1856-8 (except limited Companies).
			With limited liability under the Joint-Stock Companies Acts of 1856-8.

“In order to acquire an adequate knowledge of the law of companies, it is absolutely necessary to understand the law of partnership, of which the first is to a great extent a mere development. For this reason, each subject discussed in the present treatise is examined first of all with reference to partnerships, and secondly with reference to—

“1. Companies governed by the Banking Act, 7 Geo. IV., c. 46.

“2. Companies governed by the Letters-Patent Act, 7 Will. IV., and 1 Vict., c. 73.

“3. Companies governed by the Joint-Stock Companies Registration Act, 7 and 8 Vict., c. 110.

“4. Companies governed by the Banking Companies' Act, 7 and 8 Vict., c. 113.

“5. Companies governed by the Companies' Clauses Consolidation Act, 8 and 9 Vict., c. 16.

“6. Companies governed by the General Joint-Stock Companies Acts of 1856-8.”

Now, the above extract affords not only a very fair example of Mr. Lindley's mode of dealing with his subject, but it also reveals a frightful spectacle of the glomerate which has to be pierced and analysed by the English lawyer who would master this intricate branch of the law of partnership, and to him Mr. Lindley's work will be a safe guide, and will afford invaluable assistance.

We have said that we would refrain from risking the nausea which might ensue upon our making Mr. Lindley's book a peg whereon to hang an article on the reform of the law of Joint-Stock Companies ; but we will not refrain from adverting to one point in our law relating to *Private Partnerships*, which, in spite of common-sense and the example of other nations, is maintained in this country, and which undoubtedly ought to be forthwith taken in hand by the Legislature, and made conformable to reason. We allude to the rule by which persons who are not partners, either actually or ostensibly, but who share between them the profits of a trade, are rendered liable to third parties to the same extent as if they actually were partners.

This absurd rule was established by the well-known case of *Waugh v. Carver* (1 Smith's Leading Cases), but the foundation of it may be traced to the dictum of De Grey, L. C. J., in *Grace v. Smith* (2 Wm. Bl. 998), that "every man who has a share of the profits of a trade, ought also to bear his share of the loss. And, if any one takes part of the profit, he takes a part of that fund on which the creditor of the trade relies for his payment"! The courts in later years have exercised their ingenuity in devising means of over-riding the case of *Waugh v. Carver*, and the dictum on which it was founded ; and in some cases they have admirably succeeded, for they have held that, although a person taking a share of the profits of a trade must necessarily be a partner, yet if he take not a share of the profits themselves, but a sum *equal* to a share of the profits, he is not a partner. L. C. J. De Grey's reasoning, therefore, that he who takes a part of the profit takes a part of the fund on which the creditor relies, and consequently ought to bear a part of the loss, has been utterly

ignored in the cases we allude to, and we trust with Mr. Lindley, who has fully discussed this subject in his first volume (p. 34-40), that the legislature will interfere and altogether abolish the rule. This rule, says Mr. Lindley, "is in the highest degree arbitrary—it is grossly unjust—and it is productive of the greatest confusion. Nor can there be the slightest necessity for retaining it in a country where it is no longer wanted to prevent loans of money at usurious rates of interest."

Moreover, we may add, that since the decision in the recent case of *Hickman v. Cox* (18 C. B. 617; 3 C. B. N. S. 523), great difficulties have been felt by creditors in entering into arrangements with insolvent debtors for permitting them to carry on business under inspection. In that case, a debtor assigned his property to trustees upon trust to carry on his business, and after payment of expenses to divide the profits amongst the creditors; and it was held first in the Common Pleas, and afterwards in the Exchequer Chamber (where, however, the judges were divided in opinion), that every creditor who executed the deed was, as to third persons, a partner, and liable for debts contracted in the management of the business. Watson B. foresaw, what in fact has to some extent occurred, that the decision would put a stop to deeds of this kind, which are highly beneficial to persons in trade; for creditors will never concur in a deed which would render them liable for the whole debts of—what the learned judges agree in calling, with what etymological propriety we will not stop to inquire—a "concern." Mr. Lindley has divided his work into four books, which we will mention, first, because it is a rational and intelligent division; and next, because we have often observed that, in looking over the table of contents, one is often struck with the dire conviction of the amount of one's ignorance upon the subject, and the desirableness of obtaining some information thereon. It is like looking through a set of examination papers on topics which have not been specially studied with the view of submitting to this trial by torture, now so universally adopted. In the House of Commons, the other day, a member, in order to discredit ex-

aminations, read a number of questions from a paper which, as none of the hundreds of members present in the House could answer off-hand, they did the next thing which occurred to their minds, and laughed the loud laugh which proved their vacant minds. We do not anticipate such an untoward reception of our recording the division of the subjects in the volumes before us, though we may expect that a sense of greater security may seize the practitioner's mind when he has provided himself with the potentiality—as Dr. Johnson has it—of attaining any information on the Law of Partnership in which he may feel himself deficient. The *first book*, then, treats of the *creation and dissolution* of partnerships. The *second*, of the *rights and obligations* of partnerships and companies as regards non-members. The *third*, of *rights and obligations* as between the members themselves; and the *fourth book* treats of the *dissolution and winding up* of partnerships and companies.

Thus did Mr. Lindley resolve to dispose his subjects, and he has carried out his resolution in a masterly manner—masterly, in that he has fully embraced all that a lawyer wants such a work to comprehend; and in that there are no traces of haste to get by or slip over any portion of his subject, however distasteful or minute; and in that Mr. Lindley is perfectly free from the sin, weakness, or misfortune (for it may be any one of these) of book-making, which is one of the abominations of the day. We have rarely met with a treatise concerning which we have so little hesitation in saying that it reflects the highest honour upon the author, who has by this, his first publication, added another name to the list of eminent writers on English jurisprudence.

ART. VIII.—REPORTERS AND REPORTING.

The Reporters Chronologically Arranged; with Occasional Remarks upon their respective Merits. BY JOHN WILLIAM WALLACE, Master in Chancery for the Supreme Court of Pennsylvania. 3rd Edition, revised. Philadelphia: 1855.

NO observation is more trite and commonplace, than that our government, as practically worked, is essentially a government of non-interference with the conduct of the concerns of the people. Among us, in practice, every thing that is to be done is trusted as nearly as possible to private enterprise, or combinations of private means; to the personal energies of the people to find the proper modes and instrumentality for producing the required results. As a rule, government interferes in nothing; even with respect to matters of general and national import, this is still so. Is a new mode of locomotion discovered, calculated to operate without limit in changing the relations of every district in the country with every other, to alter the course of internal traffic, to shut up old sources of trade, to open fresh ones, and materially to vary our habits and modes of life; still the working out of the necessary details is left entirely to the choice of the people; the government lays down no plan to which the new lines of intercommunication shall be adapted, no system according to which the work shall be executed; but a point here is left to be connected with a point there, just as it may please local interests, or the ingenuity or spirit of enterprise of this or that body of speculators. And thus it happens in this, as in a thousand other instances of a similar though less prominent character, that when at length public convenience forces upon the legislature the necessity of taking up the matter, much it is found that ought to have been done at first, on a system and according to rules, has in fact been done as it is by chance, less usefully and at higher cost, but at any rate done for ever. However, the nation it seems prefers this state of things,

and is content to pay, at the price of much detriment in multiplied instances to its gravest interests, for the satisfaction of tasting its freedom from government interference. Nor is the case above glanced at the strongest proof extant of the national inveterate determination on this head. Society is regulated in this country not by enacted laws, but by the operation of the courts of justice, in expounding and applying principles in the mass of higher antiquity than any existing legislation, and in moulding and adapting unrepealed and current legislation, equally by their constructions and interpretations, into suitableness for the everyday wants, and the constantly renewing necessities of the times we live in. Is an improved system of pauper relief at length forced upon parliament by the most pressing considerations? Parliament legislates, lays down comprehensive rules, settles vexed questions, provides with all its foresight for the extirpation of abuses, and the prevention of their recurrence; nevertheless, immediately a multiplicity of cases are found to have been imperfectly dealt with, or altogether unforeseen, and the legislation of amendment is resorted to; but, after all, both that and the original enactments come to be interpreted and applied by the courts, and it is there in the end that all the vast questions of the relations between the necessitous pauper and the classes above him have to be settled. So of every other relation of society, landlord and tenant, master and servant, principal and agent, attorney and client, buyer and seller, the wrongdoer and his victim, every individual in the country learns his rights and his duties ultimately from the decisions of our courts. It might then reasonably be supposed to be a matter of vital importance to the community, that these decisions should be carefully watched, noted, collected, digested, and published in some authoritative and unimpeachable form. Every term the courts decide more or fewer questions affecting materially the everyday conduct of the business of life, as exercised by some class or order of the community. For instance, a point is decided respecting the rights or liabilities of railway passengers—a point we will suppose easy of comprehension—which every person in the kingdom would

be the wiser for being aware of for the rest of his life. Is there any one appointed as the authentic reporter of the decision? Is it any body's office or function to diffuse the knowledge of it over the country? The only answer is, the whole is left to chance. Some vague and probably imperfect account of the case which raised the question, and of its settlement, may perhaps find its way into the corner of a newspaper, and may or may not meet the eye of one in one hundred of those who are interested in being aware of what is the law respecting railway travelling in the particular instance. It strikes one then as most unaccountable, that since the period when the Year-book ceased, that is to say, before the end of the reign of Henry VIII., no organized system has ever been adopted for collecting and registering the decisions of English courts of justice. The reports called the Year-books appear to have been executed by persons appointed and paid by the crown, and to have been published at the expense and with the authority of the crown, but with no object of disseminating a knowledge of the matters decided among the people. The extreme conciseness with which these reports are expressed, the Norman-French language, and the contractions (not to speak of other defects and peculiarities) in which they are printed, manifestly adapt them only for the use of men of the legal profession, and that of a generation now gone by, as we may almost literally express it. Not that all the matter to be found in those *annosa volumina vatum* is useless or devoid of interest; ¹ Hallam has recorded his sense of the acute logic and the profound views that abound in them; and Coke has in fact constituted and compiled his commentaries on Littleton's Tenures out of passages transferred from the Year-books, mostly in the very diction (translated) of the originals. Then in places (few it is true) they afford an illustration on questions in history, particularly of constitutional history, and views of ancient life and manners, particularly of conventual life, attractive to an antiquary, but probably, on the whole, hardly worth the toil and time requisite

¹ See the judgments 2 E. & B. 216, for citations of the Year-book and older reports.

for the discovery and exhumation of them. In *Seymour v. Barker*, 2 Taunt. 201, when a very learned counsel, Serjeant Williams, was citing a case as in point from 7 Edw. III., Mansfield C. J. interrupted with, "It is a great way to go back for a precedent to the 7th Edw. III.," &c.; and Heath J. added, "Come to modern precedents, something within three hundred years." On the other hand, the courts frequently avail themselves of the lore contained in the Year-books and other old reports, when the subject requires a resort to the ancient sources of original law; a remarkable instance of which, among many others, may be seen in *Outram v. Morewood*, 3 East, 346, on a question of pleading a verdict by way of estoppel. At any rate, we do not propose getting up an examination of the character of these ancient and almost obsolete representatives of law; it is rather from the more modern reports, and from some inquiry into the later styles of reporting, when we arrive at them, that we hope, if it may be, to render this article in some degree useful. We perfectly concur in the justice of the following remark of Chancellor Kent, as applicable not merely to the Year-books, but to a great number of the elder reports:—"The ancient reports are going very fast, not only out of use, but out of date, and almost out of recollection. The modern reports, and the latest of the modern, are the most useful, because they contain the last, and it is to be presumed the most correct, explanation of the law, and the most judicious application of the abstract and stern principles of right to the refinements of property. They are likewise accompanied by illustrations best adapted to the inquisitive and elevated reason of the present age."¹

In the eighty years following the cessation of the Year-books, we have only the cases which were recorded by Plowden, Dyer, and Keilway.

It may probably be said of Plowden's Commentaries, that it is only very casually that they will be found to supply any thing applicable to the uses of the present day; the points of law dis-

¹ 1 Kent Comment. 479.

cussed and decided there having been for the most part obliterated and nullified by legislation. In Coke's time it was different. He speaks of them as works of high merit, which deserve well of all the professors of the law.

Sir James Dyer was made a judge of the Common Pleas in 1557, and chief-justice of the same in 1559. His reports commence with 4th year of Henry VIII., and continue to the 24th of Elizabeth. He reported, it seems, the most remarkable cases that came before the Court of Common Pleas, together with those which, on account of their difficulty, were adjourned into the Exchequer Chamber before all the judges, according to the ancient practice, which remained unaltered down to the reign of George IV. The first publication of the reports was about three years after his death, which took place in 1584. They were then published by his nephews in the Norman-French, in which they had been compiled. The notes of the edition in general use at the present day, are for the most part the work of Chief Justice Treby,¹ who published Dyer's Reports, with notes and references, in 1688. The last edition (in English) is by Vaillant, who published them with Treby's notes, and with new additional notes and references to modern cases and authorities, in 1794. According to Lord Campbell, these reports afford "a stupendous proof of the reporter's industry and learning. Although now of little use to tell us what the law is, they are valuable records of the history of English jurisprudence and English manners." Lord Campbell also considers him as really deserving to be called "the Shakespeare of law reporters, *as he* had no predecessor for a model, and no successor has equalled him." One may understand what Lord Campbell may mean by this comparison between the poet and the reporter; but the reasons he gives for their resemblance are extraordinarily foolish. He adds, Dyer's fame still "flourishes, and those who are most competent to appreciate his merit have praised him the most." In the preface to the Tenth Report, Chief Justice Coke speaks of "Lord Dyer's book containing the fruitful and

summary collection of that reverend father of the law, Sir James Dyer." Sir James was the first serjeant, of whom it is recorded that at his call to the degree he gave rings with a motto on them. This was in October, 1552, and his motto was:—*Plebs sine lege ruit*. As a judge he is said to have had the merit (how valuable a one he possibly had learnt by painful experience as a reporter) of being

"Settled to heare, but very slowe to speake."

So at least sings his eulogist, Whetsone, who commemorated him soon after his death in multitudinous verse.

.. Keilway reported from 12 Henry VII. to 22 Henry VIII. ; his work contains also some cases *incerti temporis*, and some *temp.* Edward III.

From this time but few reporters, for a lengthened period, appear who have obtained the confidence of the bench and the profession. Croke, Anderson, Hobart, Bulstrode, Leonard,¹ Rolle, Vaughan, and Saunders, are some of the more prominent, though not by any means of an equal amount of reputation; with these exceptions, and some few more that we are about to mention, the harvest of reporters is but weak and sickly down to the revolution. Whatever the cause, soon after the practice of publishing reports of law cases in Norman-French fell out of fashion, in consequence of a government order that they should be printed in English, and "a flying squadron of these reports" (5 Mod. 8) broke out upon the country. Alleyn, Anderson, Benloe, J. Bridgman, Brownlow, Bulstrode, Calthorp, Carter, Cary, Choice Cases in Chancery, Croke, Godbolt, Goldsborough, Hetley, Hutton, Jenkins, Keble, Lane, Leonard, Ley, March, First Modern, Moore, Noy, Owen, Palmer, Popham, Rolle, Saville, Siderfin, Styles, Tothill, Vaughan, Winch, were all first printed between 1648 and 1688. The learned author of the work whose title heads the article, considers that the worst of all the extant reports are contained among those names. However, there are certainly reporters of worse reputation than any of the above, with the exception of

¹ "Leonard's reports were always in high estimation." 1 Sugd. Powers 15, 7th Edit.

Noy and Siderfin ; for nothing can be worse than the credit of 8, 10, 11, 12 Modern Reports, 3 Salk., Holt's Reports, and some few others, all published subsequent to the revolution. It is to be remarked also, that a great number of the above squadron were published posthumously, and not always from the original manuscripts. Some of them also were printed at long intervals after the date of decisions which they record. There are cases in Benloe as old as the year 1531, or 130 years before the report was printed ; the same is true of some parts of Anderson's reports. It is also to be considered that very few of the reports, from the time of the cessation of the Year-books to the revolution, were compiled with the intention of publication ; they were for the most part designed only for the private use of the note-taker in the course of his professional duties. In this statement, however, it is not meant to include Plowden, the first eleven of Coke's reports, Styles, Saunders, and some few others. Even Coke confessed that he had not had time and leisure to publish his reports as he should have desired. The court-hand, and the abbreviations in which the old reporters enveloped their meaning, formed, no doubt, another fruitful source of error and misapprehension.

The early Chancery reporters are stated by Justice Story to be less accurate than their contemporaries in the common law courts, and he says they are shadowy, obscure, and flickering.¹ Mr. Wallace considers, that "while so little deference to precedent was had from the woolsack, no great motive existed to record cases ; and hence until we come to the time of Peere Williams, when, under a succession of eminent men, Equity began to assume the shape of a science and a system, we have few reports which inspire any considerable confidence as to accuracy, even where the genuineness of the manuscript and the capacity of the author—as in the case of Vernon—have not been brought into reasonable question." It must not be forgotten, however, that every one cannot become qualified to speak with confidence of the character of the old reports. The names of many of them are scarcely ever heard in the courts, or met with in treatises. A long series of

¹ *Vidal v. The City of Philadelphia.* 2 Howard Sup. Crt. Rep. 193.

observations and comparisons would alone entitle most men to speak with authority of the qualifications of this or that body of reports; and this is especially true of the lawyers of these latter times, when the number of reporters has so vastly increased as to render it almost impossible for any individual to attain to a sound knowledge of the merits of many of the tribe, down to the end of the time of Lord Mansfield, who has perhaps left behind him more remarks, mostly unfavourable, upon the value of reports, and the talents of reporters, than any other judge. This was then not nearly so difficult a task as now; for up to 1776 the whole number of reports in this country, including both law and equity, did not much exceed one hundred and fifty volumes.

It was the great undertaking of Sir James Burrow, who reported in the Court of King's Bench during so many years of Lord Mansfield's presidency, that worked the great revolution in English law reporting. Burrow aimed at such an extension of his report as should make the account he gave of a case useful; for this purpose, he did not scruple to incorporate the pleadings and the evidence where it was desirable, and also to recount the arguments at ample length, adding apparently all that fell from the judges as well in an interlocutory form as on giving their judgments. For practical purposes, we believe few reports have ever been more thoroughly useful than these—their accuracy has hardly ever been questioned; and if the received tradition be correct, that they were revised and corrected by Lord Mansfield himself before publication, there is attaching to them a greater guarantee for fidelity than belongs to almost any other publication of the kind. The reports of Sir W. Blackstone have frequently been excepted to, and that by Lord Mansfield himself, who was no doubt well entitled to do so, many of them being reports of his own decisions. Other persons, however, by no means so well qualified to sit in judgment upon Sir William, have taken upon them to criticise and condemn. Among others, we find M. Dupin considers him to be so inaccurate as not to be worthy to be included at all in the list of reporters.¹ M. Dupin's know-

¹ *Lettres du Profession d'Avocat*, ii. p. 575, cited Wallace, p. 26, note.

ledge of such matters may be determined on finding him telling us that the English law reports have become so numerous "et qu'ils se multiplient tellement chaque jour qu'on croit inutile de les specifier ici. On se contentera d'en indiquer les principaux auteurs. Ce sont Brooke, Coke, Croke, Dyer, Hales, Holt, Fitzherbert, Plowden, Waughan." Mr. Wallace's castigation of M. Dupin for his conceit, is remarkably mild and lawyer-like. Mr. Wallace merely observes that he does not believe M. Dupin understands the case of *Scott v. Shepherd*,¹ addicted though "he is to *feux d'artifice*." With respect, however, to soberer and more respectable criticisms on the respective merits of reporters, there seems to be little doubt that even judges have occasionally been misled to pronounce hasty estimates of the value of particular reporters from a partial view of their works. A case, perhaps erroneously reported, gives rise to an expression of distrust or disparagement, affecting the character of whole volumes; and there is much weight we think in Mr. Wallace's observation, that many judges have reflected on the accuracy of reporters merely at second-hand, and often inaccurately. An instance of this kind occurred in the Court of Exchequer Chamber not many years ago. A counsel had cited a case from Lord Raymond's reports, but was immediately met by the observation of one of the court, that he remembered to have seen Lord Raymond spoken of as an inaccurate reporter. Now, in fact, we believe it is indisputable that all which is extant to this effect consists of a single expression of Lord Mansfield, to the effect that the report of a case in his volumes of a ruling of Chief Justice Holt at *Nisi Prius*, which belongs to 10 Will. III., when Lord Raymond was a young man, was not to be closely relied on. However, the counsel not being at the moment prepared on this point, was unable to shew the extreme injustice it would be to the memory of the noble and learned lord, if the whole of the reports which he persevered in taking whilst he was a junior barrister, Solicitor General, and Chief Justice of England, are to be involved in one

¹ 2 W. Bla., 892.

common reprobation on such grounds. Lord Campbell's opinion seems to be directly opposite; he speaks in very high terms of eulogy respecting these reports in his life of Lord Raymond—"Not only when he was a student, but when called to the bar, when Attorney-General, and when Lord Chief Justice, he wrote an account of all the most remarkable decisions of the Court of King's Bench, giving the arguments of the counsel and the opinions of the judges with admirable point, vigour, and exactness."¹

Lord Mansfield was more than once particularly severe upon Barnardiston's Chancery Reports. Thus, on one occasion, he is stated (2 Burr. 1142) to have "absolutely forbid the citing that book, for it would be only misleading students to put them upon reading it. He said it was marvellous, however, to those who knew the serjeant, and his manner of taking notes, that he should so often stumble upon what was right, but yet that there was not one case in his book which was so throughout." This is perhaps a little overstrained: Lord Eldon seems to have thought so, for speaking in the House of Lords in 1827, he is reported to have said (1 Dow. and C. 11)—in dealing with a cited case of *Richards v. Syme*, which he mentioned as being reported at length in Barnardiston's Chancery Cases—"Lord Mansfield, then Mr. Murray, argued that case before Lord Hardwicke, and Mr. Barnardiston was at the bar at the same time, although afterwards, when Mr. Murray had become Lord Mansfield, if Mr. Barnardiston's reports were cited, his lordship used to say, 'Barnard—what do you call him?' In that book, however, my lords, there are some reports of great value." It is not to be overlooked however, on the other hand, that Lord Eldon's anecdotes, especially towards the close of his life, are not always to be implicitly relied on.

Perhaps we should not be quite able to go along with Mr. Wallace in the extent of misapprehension which he supposes to

¹ 2 Lord Campbell's Lives of the Chief Justices, 190; he adds, however, p. 198, that "he by no means does the same justice to himself as he had done to Lord Holt."

have gone abroad and obtained credence respecting the demerits of reporters, from "the repeated condemnations passed upon their works by persons who perhaps had never investigated the matter themselves, and the error being traceable originally to the single and perhaps unconsidered dictum of one imposing individual." We should incline to doubt whether at any time much harm was done in this way; and certainly of late years our judges have been most remarkably abstinent in ventilating their opinions of reporters. The judgment of the profession, unguided by the judges, forms the estimate in which reporters are at present held amongst us.

Speaking of English judges, we do not think Mr. Wallace is well-founded when he says:—"Numerous indeed might be the proofs, that judges have been content in this matter to draw from the stagnant reservoir of their predecessors' learning, rather than at the spring of their own research and thought;" though we certainly cordially concur in thinking, "that, with regard to the character of the old reporters, statements earliest made are more deserving of attention than those made more late, confirming or enlarging them. If, indeed, these latter contradict prior statements—referring to them especially—the case is altered; and in some circumstances might be taken to be reversed." In fact, however, very few persons are competent to judge of the accuracy of reports, beyond the trifling errors which are recognizable at a glance on the face of the report itself, and without any test or other help *aliunde*. It is nothing less than a careful comparison with contemporary reports (when there happen to be any), and that continued patiently and carefully through a long series of examples, that qualifies a man (except in gross and patent cases of error) to pronounce that the reports of this or that reporter are untrustworthy. Surely this is undeniable, and merely requires to be stated in order to meet with general acquiescence. Mr. Wallace does not, however, seem to us to be fully possessed with the spirit of the remark; in fact, he seems to be inclined to attribute more weight to remarks which are represented to have fallen from judges both in favour of and against reporters, than

perhaps those remarks are entitled to stand for; certainly these remarks do not prevent the courts from receiving and acting upon authorities derived from sources of bad repute, in cases where there is a dearth of other authorities, and where the case cited is itself reported without any patent blemishes, and is not at variance with other decided cases. In such cases, many instances might be shown where judges have consented to adopt the authority of a decision cited from an indifferent source, where the thing decided in it is according to principle, and resting on reasoning in itself not open to exception. The case of *Pigot v. Sury*, an authority frequently resorted to in watercourse cases, though only reported by Popham, not in general a reporter of acknowledged authority, is in point as an instance. Mr. Wallace seems to imply that the members of the profession in the United States are not largely possessed of this species of erudition; and he mentions one striking instance of mischief that occurred in the Supreme Court of the United States, owing to an inadvertence of this kind of Chief Justice Marshall, and which he says had the effect of almost totally subverting (until it was overruled), in two states of the union, the entire Law of Charitable Uses. The mistake arose from the chief justice having relied, without comparing the contemporary reports, on a doubtful authority from an old reporter, as to the correctness of whom there were in fact, though unknown at the time to the learned judge, the gravest grounds for doubt.¹

It is certainly true in England, that Lord Mansfield has been more often quoted, for opinions about the reporters, than almost any other single judge. But we differ altogether with Mr. Wallace, when he imputes the following motive and reason for this:—"In truth, the Lord of Caenwood found it necessary to his system to discredit the old authorities of every sort: he meant to pull up the landmarks of the law, and to resettle it upon what he deemed the principles of equity and common-sense. His taste, too, was more sympathetic with Pope than with Plowden, and he had too much both of the power and independence of

¹ *The Baptist Association v. Hart's Executors*, 4 Wheat. 42. *Vidal v. Girard's Executors*, 2 Howard 192.

genius either to pursue authorities or properly to compare their relative weight." This seems to be rambling from the matter in question ; but we confess we firmly believe the truth to be, that Lord Mansfield, during the whole course of his judicial career, was in the daily habit of exhibiting an anxious respect for precedents, and especially for the reasonings of preceding judges, uttered in giving their judgments: that he sought for the best accounts of these reasonings, and that it was the habit of comparing together contemporaneous reports of the same case, that led him to form opinions on the relative merits of reporters, to an extent which it has not often occurred to judges since his time to form. In this country we believe we may say, it is now a totally exploded fallacy, set on foot by, and resting alone on, the venomous slanders of Junius, to say that Lord Mansfield has evinced—judging from the reports of the immense period during which he presided over the Common Law—any of those tendencies of designs, so vague and mysterious as they are, of remoulding the law according to his own notions of equity and of substantial justice. Mr. Wallace tells us—"Some reporters are minute, others general ; one man gives you a daguerreotype, another but a pencil outline. Burrow is a very good reporter, yet it cannot be doubted that the awe with which something magic in Lord Mansfield inspired every one about him, and which led Sir James to treasure the minutest dictum that fell from his lips, has given body and permanence to what may have been a conversational, or suggestive, or *pour s'informer* remark, not delivered as a judgment for posterity. We are ignorant, of course, of the manner in which an observation was uttered ; and, translated to metal, a passing idea assumes the weight of judicial resolution." This conjecture we must leave to operate with our readers with such force and weight as they may attribute to it ; for ourselves, we can only say that it seems particularly unlikely that Lord Mansfield—if these reports were in truth subjected to his eye before publication—should have left on record observations of his open to the above objections, even had his faithful *auceps verborum*, Sir James, occasionally relaxed his watchfulness so far as

to allow of such blemishes to appear in the manuscript report. Still less do we subscribe to the charge made by Mr. Wallace, p. 30, that, pressed by an argument, he was quite unscrupulous in choosing the safer course of discrediting a reporter rather than depart from a precedent.

A singular confirmation of Burrow's accuracy is set out by Mr. Wallace, and is in substance as follows :—

In *Cooper v. Chitty*,¹ Lord Mansfield, commenting in his judgment on a case of *Lechmere v. Thoroughgood*, which had been relied on in the argument, observes, that it is best reported in 1 Shaw, 12, and says it is the only clear statement of it in any of the reports ; and then he proceeds thus, “Comberbach, in giving the judgment of the court, which is the only sensible part of his whole report, for it is plain to me that he did not understand the former argument on the former day, which is the first part of his report of the case, agrees with Shower, and says, that ‘the court were of opinion that a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time.’ But he must be mistaken in the first part of his report, for Lord Chief Justice Holt could never say that the property of the goods vested by the delivery of the *feri facias*, and the extent for the king afterwards came too late.” Now, in the later case of *Rorke v. Dayrell*,² Lord Kenyon thought fit to remark on this in a way which was afterwards thus exposed by Vaughan B.,³ in giving his opinion on a summons to the judges before the House of Lords, in the case of *Giles v. Grover*.⁴ Lord Kenyon concludes his judgment in *Rorke v. Dayrell* with these words :—“With respect to what is supposed to have been said by Lord Mansfield in *Cooper v. Chitty*, of Comberbach having mistaken Lord Holt's opinion in *Lechmere v. Thoroughgood*, it is as probable that the report of that observation is mis-stated.” If

¹ 1 Burr. 35, 36.

² 4 T. R. 412.

³ Mr. Wallace continues in this Edition the mistake of the Edition of 1845, of attributing this detection to the present Lord Wensleydale. See, however, the Edition of 1845, p. 53.

⁴ 6 Bli. N-S. 368.

Lord Kenyon, before he delivered his judgment in *Rorke v. Dayrell*, had fortunately referred to his own note of *Cooper v. Chitty*, which has since been published by W. Hanmer, from his lordship's original manuscript, instead of impeaching, he must have borne testimony to the accuracy of Sir James Burrow's report of Lord Mansfield's judgment in that particular case. The notes of Sir J. Burrow and Lord Kenyon on this point are in such perfect harmony, that the one may be considered the fac-simile of the other, and we will transcribe them. Lord M. is reported by Sir James Burrow to have said, "that Comberbach, &c., &c., &c." (as quoted above). The following is from Lord Kenyon's report of *Cooper v. Chitty*, p. 422: "This case of *Leckmere v. Thoroughgood*, is reported in two other books; in Comberbach 23, the latter part of the case is agreeable to that of Shower, that a construction should not be made to make the officer a trespasser by relation; as to the other part of the report, it was manifest to me that he did not understand what they were arguing about, for he makes Lord Holt say what he never could say about barring the extent of the crown. In 3 Mod. it is as plain that the reporter never understood what passed; for he says, 'the extent came too late, and that the property was bound by the *fi. fa.*, though the contrary is very clear.'" Here we find, then, a statement attributed to Lord Mansfield, which Lord Kenyon surmises to be incorrectly given, and then Burrow's accuracy vindicated by Mr. Baron Vaughan, in the course of a solemn statement of his opinion to the House of Lords, by the citation of Lord Kenyon's own note of the same case, published in his own reports.

Let us now examine in some degree some of the various styles of reporting. At the head of them all, for massive authority, stands the masterly mode that was followed by Sir Edward Coke. He published in his lifetime eleven books of reports. The first report appears to have been published in 1600, when he was attorney-general, the two following in 1601; the fourth and fifth in 1603; the following six parts between 1606 and 1616, the eleventh being published in 1615. Such is the account that seems to result from comparing various statements.

These reports were printed in the first instance in the original Norman-French in which they had been written. The twelfth and thirteenth were not published until about three years after his death, and they were translated before publication, an ordinance of parliament having directed some time before, that all law proceedings, entries, records, and reports, should be in English. These were among the manuscripts which were seized by the government when the chief justice had his *supersedeas*. In compliance with an address to the House of Commons, on the meeting of the Long Parliament seven years afterwards, they were restored to his family and printed. "Although inferior in accuracy to their predecessors,¹ they are found to contain many important decisions on political subjects which he had not ventured to give to the world in his lifetime." My Lord Coke upon his *supersedeas*, 15th Nov., 1616, was ordered by the king "to expunge and retract such novelties, and errors, and offensive conceits as were dispersed in his reports;" but he showed, we are told, that there were no more errors in his five hundred cases than in a few cases of Plowden, and delivered a written explanation of other points.²

Probably Coke's is the most gigantic undertaking, or nearly so, of any that has yet appeared in this department of labour conducted by a single hand. Vesey junior, and Beavan, possibly exceed in mere length; but the labour bestowed on Coke's reports, as apparent from intrinsic evidence, is incomparably greater. It is to be remembered that in his days there were hardly any treatises to aid him in compiling the masses of notes which he appended to his reports; and though before his own there were only twelve volumes of reports extant, of which nine were Year-books,³ yet the reports in the Year-books are far more difficult of consultation, and require, and probably must always have required, incomparably more assiduity and labour to arrive at their mean-

¹ See 4 B. & A. 614; 10 B. & C. 275.

² See Bacon's Works, Vol. VI., 122; and Id. 121, 128, 132, 173.

³ 1 Lord Campbell's Lives of the Chief Justices, 339, note.

ing, than ten times the quantity of matter in the form of modern reports would require.

Lord St. Leonards thus expresses his opinion of Coke's style of reporting:—"Let not our just admiration of Sir E. Coke's profound legal learning carry us too far. His system of turning every judgment into a string of general propositions or resolutions, has certainly a very imposing appearance; but it is a system of all others the least calculated to transmit a faithful report. Is it not to be feared that the bias of a man's own sentiment may involuntarily lead him to pervert the opinions of others in order to support his own?"¹

Lord Campbell says:—"Notwithstanding the value of his reports, no reporter could venture to imitate him, (Campbell's *Lives of Chief Justices*, 340.) He represents a great many questions to be *resolved*, which were quite irrelevant or never arose at all in the cause, and these he disposes of according to his own fancy. Therefore he is often rather a codifier or legislator than a reporter, and this mode of settling or reforming the law would not now be endured even if another lawyer of his learning and authority should arise. Yet all that he reported as adjudged was received with reverence."

Coke's own notion of what is a reporter's duty, may be seen in his report of Calvin's case, where he "challenges that which of right is due to every reporter; that is, to reduce the sum and effect of all to such a method as, upon consideration had of all the arguments, the reporter himself thinketh to be fittest and clearest for the right understanding of the true reasons and causes of the propositions and resolutions of the case in question."

It is manifest that such a scheme of reporting could only be entertained by a man who was conscious of powers and acquirements at least equal with those of the judges themselves whose decisions he was collecting, and, besides, was able to give the time and labour necessary for the thorough investigation of each case as it passed through the court, for the purpose of deriving all

¹ 1 Sugd. Pow. 22, 7th edit. See also 2 Ld. Raym. 913. Willes, 568. W. Bla. 1234. Hob. 300.

those collateral results, and heaping up those stores of matter, but too often in a far degree cognate, which Coke so much affected in his statements of judicial decisions. In fact, also, the question of Lord St. Leonards seems to be answered by the consideration, that probably much that Sir Edward Coke added of his own, was quite as sound and well supported as that which the court in form adjudicated.

Probably no reporter will ever arise who, in his generation, shall be so superlatively excellent as Saunders. Without going the length of Lord Campbell, who tells us, "His reports, which are so entertaining as well as instructive, that they have instilled into many a taste for juridical learning, notwithstanding its imagined dryness;"¹ we nevertheless contend that no writer in this line has ever equalled the merit of these reports in respect of clear, concise, and pointed method in which the effect of the arguments is stated, and the force of the decisions enunciated. Allowing for the circumstance, that the cases reported for the most part turn on points of pleading, with some more on matters of practice and procedure, and observing that the exigencies oftentimes made it very desirable for practical purposes that the whole record should be set out in each case, which we should in these days, in far the majority of instances, look upon as an unmeaning superfluity, if not a book-making trick, it is impossible not to be struck with admiration as we remark the extremely sparing use of words, without any, the smallest, sacrifice of clearness with which the business and points of each case is evolved. To convey the fullest information in the least space is the canon of reporting,² and this of all reporters Saunders has effectuated. It would be as bootless a task to attempt to abridge or condense, or pare him down, as to shorten the straight line joining two points. A good report ought to resemble the Thames—the Thames, that is, of Sir John Denham—it ought to be

"Though deep yet clear, though gentle yet not dull,
Strong without rage, without o'erflowing full."

¹ 2 Camp. Lives of Chief Just. 73.

² "We are now overwhelmed with law reports, and I think that every law reporter deserves well of his country who condenses."—*Per* Lord Cranworth in *Dudgeon v. Patrick*, 1 Macq. H. Lds., 724.

It is not to be forgotten, however, in considering the masterly excellence of the Saunders' achievement, that, with the exception of a very trifling proportion of the cases, he was engaged as counsel in all the cases which he reports; and hence he had the opportunity for acquiring a fuller acquaintance with facts, and with the bearings and points of the arguments, than can almost ever be within the power of a reporter in ordinary circumstances. Perhaps, among modern reports, those which stand next to the above for the care and success with which extraneous matter is stripped off, and nothing but the essence of the matter presented to the reader—for brevity achieved without a surrender of utility—for practical purposes, are the Queen's Bench reports, by Ellis and Blackburn.

Among the reports professedly conducted on the more diffuse scheme of representing the discussions and decisions of our courts of justice, we perhaps may be allowed to mention Burrow, Henry Blackstone, Bosanquet and Puller's first series, and Scott's Reports¹ in their long sequence, as those which are found among the most satisfactory for consultation in the everyday business of the professional practitioner. Most persons of this class must be well aware of the comparative value of the report which presents a full account of the facts proved, and the report defective in this respect, when the purpose is to determine in practice a question of evidence. The decision, as studied in the former report, may probably solve, or materially tend to solve, the difficulty; whereas, in the latter, it will avail but little even to shew a light, or point the path to the solution. So, with respect to points of pleading (though the matter is of less importance at present than in bygone times, at least with respect to pleadings at Common Law, whatever it may be, or may become, with respect to pleadings on equitable grounds, still), it is as a rule imperative that decisions on topics of pleading ought always to be preceded by a full statement of the pleadings decided on. The rule in fact is so

¹ At the same time, we must admit that there is much of most unnecessary expansion and repetition in these reports of Mr. Scott—an evil bitterly complained of by many.—Ed. L. M. & R.

obvious, that it would not be worth noticing specifically if it were not that in some reports, especially in some of those which date about fifty or sixty years back, the practice was not always followed. Perhaps among the least valuable of the later reports, for these or similar reasons, most persons would rank Taunton, and Maule and Selwyn's reports—the eighth volume of the former has been more than once denounced by Lord Wensleydale as worthless; and the latter are perhaps less cited in daily practice than almost any other reports of modern times, in proportion to the period of time over which they extend. None of the diffused style of reports, in our opinion, exceed those of Durnford and East, usually cited as the Term Reports, for care and accuracy of finish, including a matchless propriety of style, which they every where maintain. As to their general accuracy, and the point, and correctness, and precision, with which the essence of the decisions is abstracted into the marginal notes, these reporters have perhaps never been surpassed. In a minor point of accuracy, but still one which saves incalculable labour and annoyance to the reader—the correctness of the references to the cases cited in argument—they are most praiseworthy. The same high qualities, maintained, moreover, through a greater number of years, mark the reports in the Exchequer of Pleas of Meeson and Welsby. The reports of cases in the *Law Journal* and *Jurist* have not unfrequently met with commendation from the Bench; and some of the judges have occasionally cited from the Bench cases from either of these periodicals, deciding important questions, which had not been noticed elsewhere.

With respect to the question of the general accuracy of the English law reports published during the last half century—a period which comprises not only the greatest amount of matter, but the resolution of the most complicated questions that have been dealt with by our courts, perhaps during any equal period of history, the result of inquiry, we think, will prove on the whole satisfactory. No doubt the only available test is the comparison of contemporary reports of given cases. The general result will be, we believe, to produce a sentiment of warm

admiration in the examiner, who goes into the task with due qualifications in respect of learning and understanding, and a candid recollection of the various difficulties that environ the task, and the arduous and incessant watchfulness and labour which it demands.

As a guide to a knowledge of the accepted character of our various reporters, especially of the earlier of them, we think Mr. Wallace's book performs all that it promises. A great amount of information on the subject is heaped together in it with highly praiseworthy industry and care. The book appears to have met with wondrous success in the United States. It will be seen that the edition which we have placed at the head of this article, and to which we cordially invite the attention of our readers, as a useful companion of their studies or practice, is the third. The second edition was only published in 1845, a fact which indicates the existence of a wide field for the sale of the work in North America, and by consequence measures the general acceptability among the profession there, of a performance which certainly only requires to be known to win a corresponding popularity here.

With a view to practical utility, we have compiled from various sources the following alphabetical table, comprising references to nearly all the occasions in which the reporters named have been characterized or commented upon by judges and other authorities.

NAMES OF REPORTERS.	REFERENCES TO AUTHORITIES.
Aleyne - - - -	2 Show., 164.
Atkins - - - -	5 Taml., 64. 1 W. Bla., 671.
Barnardiston - -	2 Burr., 1142. 2 Ball & B., 386. 4 T. R., 57. 2 Dow., 689, n. 2 Brow. Ch. Cas., 36. 8 T. R., 43. 1 East., 642. 1 Dow & C., 11. 1 Dow, 333 n.
Blackstone, W. -	Doug., 93, fol. ed. Sugd. V. & P., 191. 5 Bur., 2658, fol. ed.
Barnes - - - -	22 L. J. Ex., 284. 3 B. & P., 245.
Bracton - - - -	3 T. R., 257. Report of Committee of H. of Commons on Public Records, p. 82, App. 8 Rep., 35. 1 Show., 99. Fitz. Abr., tit. Ward., N. 71. 14 How. Sta. Tri., 33. 3 B. & C., 99.
Bunbury - - - -	5 Burr., 2658.
Burrow - - - -	24 L. J. Q. B., 248.
Calthorp - - - -	2 Burr., 249.
Carter - - - -	4 C. B., 592, note.

- Carthew - - - - 2 T. R., 776. Willes R., 182.
 Clerke - - - - 3 T. R., 338.
 Coke - - - - 2 Burr., 858. 1 Sugd. Pow., 22, 7th edit. 10 B. & C.,
 275. 4 B. & A., 614.
 Croke - - - - 2 Keb., 316.
 Comberbach - - - - Cunningham on Simony, 77. 13 Q.B., 725, 726, note.

 Dalison - - - - 11 Q.B., 471, note.
 Davy - - - - Palm., 462. Dyer, 145. Latch, 238. 4 T. R., 194.
 Dyer - - - - 2 T. R., 84. 4 Dow., 202. 1 Jur. N.S., 1016.

 Espinasse - - - - 22 L. J. Ex., 317. 13 Q.B., 840.

 Finch - - - - 3 Atk., 334. 1 Wils., 162.
 Fitzgibbon - - - - 3 Atk., 610.
 Freeman - - - - Cowp., 15. 16 Ves., 580. 1 W. Bla., 140. 3 Ves., 580, n.
 1 Ball & B., 307.

 Gibson - - - - 3 Burr., 1874. 11 Q.B., 658. 7 A. & E., 894.

 Hardres - - - - 1 W. Bla., 140.
 Hobart - - - - 6 T. R., 441. 1 Ves., 305.
 Holt, C.J. - - - - 1 Wils., 15.

 Jenkins - - - - 1 Wils., 9. 3 Atk., 53.

 Keble - - - - Caldec. R., 332, 338. Dougl., 292. 3 Wils., 330. 1 W.
 Bla., 366. Ridgw. Cas., T. Hardw., 100. 4 T. R.,
 649. 28 L. J., C. B., 223.
 Leonard - - - - Qu. Warr. Cas., Treby's argu., 30. 3 Chanc. Cas., 49.
 1 Sugd. Pow.
 Lofft - - - - 5 J. B. Moore, 391. 2 Bro. & B., 536.

 Molloy - - - - 3 C. Rob., 269.
 Moseley - - - - 5 Burr. 2629. Ld. Campb. Lives of the Chancellors,
 iv. 614.
 2 Mod. Reps. - - - 1 Ld. Raym., 537.
 4 Mod. Reps. - - - 2 Ld. Raym., 1071.
 6 Mod. Reps. - - - 1 Ves., 11. Ridgw. Rep., T. Hardw., 126.
 8 Mod. Reps. - - - 1 Burr., 386. 3 Burr., 1326. 3 M. & Ry., 401.
 9 Mod. Reps. - - - 10 A. & E., 73. 2 Jac. & W., 171. 7 T. R., 239.
 10 Mod. Reps. - - - Dougl., 664, note. Id. 61, Cowp., 178. 2 Burr., 588.

 Noy - - - - Cunningham, Simony, 77. 1 Ventr., 81. 2 Keb., 652.
 Co. Litt., 54, note, 358.
 11 Mod. Reps. - - - Cowp., 16.
 12 Mod. Reps. - - - Dougl., 82, 83. 3 Burr., 1326.

 Palmer - - - - Stra., 71.
 Plowden - - - - 4 Bligh, 44.
 Popham - - - - 1 P. Wms., 17. 1 Keb., 676.

 Raymond, Lord - - - 1 Burr., 36. 1 W. Bla., 65, 70. 3 T. R., 261. 4 Cl. &
 F., 761. 1 Ld. Campb. Lives Ch. Justices, 72.
 Rolle - - - - 12 Mod., 639. 1 Mod., 273.

 Saunders - - - - 3 Burr., 1730. 2 B. & P., 23. Willes, 479. 3 Dow., 16.
 1 Cro. & J., 9.

Salkeld - - - -	2 East., 8 note (6).	1 Keb., 656.
Sayer - - - -	1 Sugd., Vend. & P., 80.	
Siderfin - - - -	2 Ventr. Comberb., 377.	
Strange - - - -	Fost. Cro. L., 294.	
Taunton - - - -	23 L. J. Ex., 180.	
Vaughan - - - -	2 Ves., 281.	
Vernon - - - -	1 Atk., 556.	10 Mod., 530. 1 H. Bla., 326.
Viner - - - -	1 Burr., 364.	Dru. Ir. Chanc. Cas., 150.
Peerc, Williams -	2 My. & K., 757.	3 Ves., 130. 4 Ves., 462.
West - - - -	4 Tau., 85.	
Winch - - - -	6 T. R., 441.	

ART. IX.—*An Introduction to the History of Jurisprudence.* By
D. CAULFEILD HERON, LL.D. London: John W. PARKER &
SON. 1860.

THE history of jurisprudence must be included in any enlarged scheme for writing the history of civilisation. The character of society—the physical conditions under which it exists—its knowledge and morality—determine its system of laws; although during certain small epochs cause and effect seem inverted, and it delusively appears to casual observers that it is the laws which form the character of the people, mould its nature, and regulate and decide its destinies. When it is said of a country, that it is not free or great because depressed by bad laws, and governed by vicious codes, it would be more correct to say, that its legal system is imperfect, because the people are not wise and powerful enough to claim or desire what is better, and are either not worthy of or not fit for a higher jurisprudence, or a more perfect administration of justice.

Whilst the history of civilisation cannot be written without reference to the prevailing systems of jurisprudence which were established at various epochs, so, too, it will be found impossible to trace the rise, growth, and connection of the laws of the various nations which have covered or now cover the earth, without

scanning the condition under which they have arrived at their national life. There is a saying so common, and so often repeated in the leading articles of newspapers, that it is now frequently found even adorning the original eloquence in the British legislature, to the effect that, if a ruler had the making of the ballads of a people, he might be indifferent as to who composed its laws. This threadbare apothegm contains a certain degree of truth. It holds good so far as it expresses the fact, that popular ballads and proverbs will be more frequently in the minds and mouths of the multitude than clauses of statutes, or marginal notes from Meeson and Welsby; and, indeed, even lawyers may admit that the morals of popular rhymes are more applicable to most of the occupations in an ordinary man's life than the doctrine contained in legal maxims. But there is a truth which is more important than that contained in the comparison between ballads and laws, which is, that neither song nor law, neither verse nor section, will have real vitality or important influence over a nation, except as it springs from and remains in harmony with the popular character, and expresses its feelings and its wants. What multitude of poems and ballads have happily been irretrievably lost; and what innumerable laws were still-born, or, after a faint spasm of life, have withered because they were alien to the feelings of the times, and did not fulfil the necessary conditions for exerting effective influences.

We believe, therefore, that men make laws and poems, and not that laws and poetry make men; and further, that the most perfect codes framed by a closet philosopher, to solve every possible difficulty which human beings living in society may experience, may yet prove utterly abortive when they are attempted to be applied to an unprepared public. But the study of the various systems of laws, successful and unsuccessful, must still be of great utility to the jurist and the legislator. "And thus," says Mr. Heron, "discussing positive laws upon the inductive method—examining the different legislative systems of different nations, and other results, upon the happiness of mankind—comparing slavery with freedom, ignorance with knowledge—accord-

ingly as these have been checked or developed by the great forces which have swayed human destinies, we, by the observation of facts and the use of reason, selecting the good, eloining the bad, may gradually arrive at that system of law which is most in conformity with natural justice.”¹ Now, there can be no doubt that, could we in this or any other way arrive at the *certain* knowledge of “natural justice”—however difficult this may be to define—it would be a valuable acquisition as a standard for construction and administration of laws. Yet should any enthusiastic legislator attempt to apply laws, arbitrarily derived from any great discovery he might thus make, he would meet with signal failure. It would be as though a strong-minded and absolute empress in the realm of the *beau monde*, determining to abolish and root out the vice of crinolines and other hideous follies of fashion, were to call suddenly on the female public to obey her injunction and imitate her example, appearing henceforth utterly disrobed, arrayed in “natural beauty.” However superior such an authority, an attempt like this would fail, and it would be seen that the nude figure would still, according to the fleeting fancies of the public, be covered more or less with the filthy rags of the prevailing vanity and popular unrighteousness. Mr. Heron, indeed, does not fall into the error we are here pointing out, for he continues quoting in parts the splendid language of Mackintosh and Burke:—

“The duties of the jurist and the legislator are perfectly distinct. The business of the jurist is merely to state those general principles which are true in all times and under all circumstances. The legislator must regard the historical development of the people; and it cannot be too often repeated, that all actual legislation must be a compromise between history and philosophy. No two nations ever existed having precisely the same standard of morality embodied in their laws. In no nation is the moral standard the same at different periods of its development. The law is always below the moral standard of the best citizens, and above that of the worst. The legislator must take heed that his legislation coincides with the public opinion of the mass, or the enforcement of a law becomes impossible. Thus duelling, where

¹ Heron, p. 44.

the issue was fatal, was murder, punished with death by the common law of England; but the law could not be enforced until late in the nineteenth century. There is not in the whole compass of human affairs so noble a spectacle as that which is displayed in the progress of jurisprudence, where we may contemplate the cautious and unwearied exertions of a succession of wise men through a long course of ages, withdrawing every case as it arises from the dangerous power of discretion, and subjecting it to inflexible rules of positive law.

“What can be more instructive than to search out the first obscure and scanty fountains of that jurisprudence which now waters and enriches whole nations with so abundant and copious a flood—to observe the first principles of right springing up, involved in superstition and polluted by violence, until by length of time and favourable circumstances it has worked itself into clearness—to view the laws, sometimes lost and trodden down in the confusion of wars and tumults, and sometimes over-ruled by the hand of power—then, victorious over tyranny, growing stronger and more decisive by the violence they have suffered; enriched even by those foreign conquests which threaten their entire destruction—softened and mellowed by peace and religion, and improved and exalted by commerce, by social intercourse, and that great opener of the mind, ingenuous science?”

Connected, then, as the jurisprudence of a country must be with its learning, wealth, and liberty, it is inevitable that the writer who attempts to recount the universal history of its progress, must keep before the eyes of the reader the characteristics which distinguish the epoch to which each particular jurisprudential system described belongs. But this necessity involves the danger of the writer dealing so generally and diffusely with the subjects which surround his particular topic, as materially to interfere with the true and unembarrassed course of the main subject he has proposed to follow. Many other difficulties beset the historian of jurisprudence, who, to profound scholarship in ancient and modern literatures and languages, must add an exact intimacy with technicalities of many and various systems of law, their procedure, and practical character. Under these circumstances, it is not to be wondered at that the “History of Jurisprudence” has not yet been written. Mr. Heron is a man too wise, and a lawyer too learned, to have attempted it in the volume he has just sent forth to the world. He says in his preface, in which,

unlike those of many authors, he gives an accurate account of his work, "I have written the following pages as an *Introduction* to the History of Jurisprudence. I have attempted to give an historical review of the great authors who have scientifically cultivated law, combined with a sketch of its internal development." He adds that a great portion of the book is a compilation, and that, following "the example of distinguished authorities, he has taken whatever appeared most valuable from the works of former writers." The publications of Tennemann, Hallam, Mill, Wheaton, Lerminier, Janet, and others, authors whose works contain the evidence of what was the jurisprudence of other times, are laid under contribution by Mr. Heron, who, in one goodly-sized volume, has thus contrived to present an excellent "Introduction to the History of Jurisprudence." The abstract made by Mr. Heron of those works of the leading jurists, foreign and English, in which the principles of jurisprudence have been successively developed, is a capital feature of his treatise; for the majority of even the well-educated members of the legal profession will always be to a great extent unfamiliar, at least directly, with a large proportion of the leading foreign authors and founders of the great schools which have from time to time risen in Europe.

It is a convenient and natural method of seizing the history of a science, to mark the successive epochs by means of the great names of the professors or discoverers belonging to it. Whatever may be the causes which, combined, produce the great men of any time, they always appear, and shine forth, and culminate at critical junctures; and thus receive the credit or incur the responsibility of creating original schools of science, whilst they afford convenient means of dividing the history to which they belong. We use the names of kings and queens—to whom we loyally impute the quality of greatness whether it exists or no—in order to divide into books and chapters the history of an empire; and thus we may catalogue the succession of learned men who have left the impress of their genius or of their labours on the science of jurisprudence, and employ their names as land-

marks by which we may the better study its development and progress.

Laws are the consequence of the wants and the capacity of men. As these mutual relations multiply and become complex, the necessity for fixed regulations arises, and on the capacity of men to invent equitable rules and become obedient to them, depends the perfection of the system founded. It is the special province of the politician and jurist, by their investigation and genius to give form to, and express the particular character of, these circumstances in rules of government, in codes and modes of procedure; it is for them, moreover, to examine the history of jurisprudence as a means of judging what is our relative position with respect to the past and future, and thus to become the better able to determine whither we are immediately tending. We find it affirmed in the Institutes, "*jurisprudentia est divinarum atque humanarum rerum notitia, justī atque injustī scientia*;" but the "*notitia rerum humanarum*" can be accurately arrived at only by a critical examination into the state of our own times, and by comparing it with that of other countries and periods of the world's history.

When the question, for example, is asked, What is the position of England in the history of jurisprudence? the easiest and most common answer given is—one of transition; especially when we contrast our system with those of the leading continental states, which have fixed codes and unvarying procedure. But to say that our condition is one of transition is to say little, unless we can further explain *from* what we are certainly moving, and whither we are probably tending. Let us for a moment consider these points, taking only our own modern history, and our knowledge of the forces now at work, to determine our present position. We certainly are competent to point out, with some exactitude, from what we have very lately been emancipated in this country. The two demons which until lately infested the English law of procedure were—Fiction and Technicality. The fictions were invented and long maintained, for the most part, in veneration of principles of which they were the expression; whilst

excessive technicality was preserved owing to a slavish adherence to forms after they had ceased to contain the spirit of the laws. The same blindness of the legislature which, at the beginning of the present century, caused the criminal code to exhibit a degrading inhumanity, made, for a long time, our civil courts machines of torture and instruments of cruelty to suitors. The rights of the people were habitually disregarded, and mere conservative instincts were cherished, to the detriment of the many for the convenience and profit of the few.

From modern political changes the necessities and wants of the public, in relation to the administration of justice, have been carefully attended to. Bentham, Romilly, and Brougham, each in his own sphere, and with his own particular weapons, forced upon the attention of the thinking public, and the governing bodies, the reforms of which we are now reaping the fruit. Not only have we the benefit of the reforms they brought about, but we have been taught by them the roads to future reforms—how to keep these roads open and mended—how to span the rapid currents which we must bridge, if we would avoid being carried away into deceitful pastures or dangerous sloughs. Above all, we have (at least we hope so) been taught the great lesson, that the laws of a country must be developed *pari passu* with the development of society; that whilst true legal principles are permanent, rules of law and systems of freedom must be subject to modifications which practical men of the day may, from time to time, deem requisite. Unfortunately, it is not equally to the interest of those who see most clearly defects in our systems to invent remedies or second their enactment. The judges are habituated to these defects; leading practitioners thrive in spite, if not in consequence of them; smaller men are not important enough to attract attention to them, and “the general” are not learned enough to identify them; besides which, there exists the class of the superficial and discontented, who encumber genuine efforts, hold out false lights, and bring disrepute upon the very name of “law reformer.” Notwithstanding all the clogs, perverting forces, and imperfect machinery

of law-making, all of which, more or less, are for ever injuriously affecting the legislature, it cannot be doubted that we have been for years clearing away imperfections, and have laid the groundwork of better administration of justice in all our courts, and in all our forms of law. Those who remember what conveyancing was, with its fines and recoveries, leases and releases—what was the law relating to judgments and wills, and indeed all that concerned the business which came in and went out of conveyancing chambers and solicitors' offices—will admit that rational and sensible progress has been made in these branches of practice. So, when we remember what was the condition of Courts of Equity as they existed in Lord Eldon's time, and the nature of the precedents of pleading at common law, and the books of practice of the last century, we shall not fail to see the vast strides which in these later days have been made. This epoch in the history of English jurisprudence through which we are now passing, will not, we think, have to be passed over in silence by the historian, especially if, as we believe, the next stages to which we are approaching are destined to be no less effective or important.

That much is still being attempted in carrying out further alterations on the law of real property, the bills recently before the legislature clearly prove.¹ They show that, in the amelioration of this important branch of national law, finality cannot be now predicted. In fact, all except those who believe themselves pecuniarily interested in keeping things as they are, and those who are constitutionally averse to all change, are calling for further facilities in the practice of conveyancing. The political causes of this are evident. The commercial spirit of the public wants to buy and sell land as it does ships, sugars, and cottons. Sir Hugh Cairns and Sir R. Bethell are but the officers endeavouring to carry out the will of the masters of England. At present we may, however, observe, they are more obedient than successful. Still, their failures are only the natu-

¹ Vide L. M. and R., Vol. 7, p. 187.

ral introduction to the coming change. The causes of their failures are not less obvious than those which produce the demand for the reform. The former arise from the incongruities which generally hamper our legislative efforts. Practical and experienced reformers are not allowed to construct the requisite measures; the proposer of any particular measure is not the draftsman of the bill. The designer does not introduce it to parliament. The exigencies of politics, and the hurried rivalry of partisans, affect vitally the construction of a bill. In attempting to make compromises in form, principles are sacrificed. Immaterial amendments and material alterations are inserted in what ought to be a complete and well-considered bill. Take, for example, Sir Hugh Cairns' two Real Property bills, where, in the few days that they were before the House, upwards of *one hundred amendments*,¹ including numerous new and inconsistent clauses were introduced, and this in a scheme, be it recollected, which was to have affected the real estate of the whole country. Nevertheless, these are but the minute incidents which belong to this important department of our law.

Again, the annihilation of the anomalies from the present unnatural separation of Law and Equity, is evidently at hand. After having pressed itself on the minds of thinkers and writers, an important reform has been brought under the notice of the legislature, and is now receiving the necessary ventilation, raised, to a great extent, by the windy words and violent gales of prejudice. Before long, the illiberality which is encompassing the efforts of the promoters of one of the most valuable attempts at harmonizing and simplifying our procedure will be vanquished; and this, the natural and necessary consequence of other reforms recently brought to a successful issue,² will take its place as another triumph of the present generation of lawyers.

We will only advert to two other points which will distinguish the present from other periods of our jurisprudence. The one

¹ We believe the net number to be 103, inclusive of new clauses inserted and original clauses expunged.

² By what we are grieved to call the *late* Common Law Commission.

is the criminal code, which, though impending, is just now held by such shaky hands that, whether it will stick or drop, fall with all its imperfections intact or be broken into bits, we dare not prophesy. The other is the new law relating to divorce, which succeeded in reaching its place in the Statute Book, in spite of its opponents having enlisted against it all the virulence of sectarian bigotry and political faction.

We have chosen these modifications of the laws of England for enumeration as being familiar to the practical lawyer in England, and as indicative of our relations to the jurisprudence of the preceding generation, and prophetic of the future course which our laws are pursuing. We might have taken a larger period (including epochs of more violent changes) for comparison, but not, we think, so usefully with regard to the object in view. Although jurisprudence is defined as "the science of positive laws, the art of legislation, and the practice of law," for our purpose we have found it better to limit our observation to the history of the last division—viz., that of the "practice of the law," and that in England only during the most recent periods.

The definition just given reminds us again of the vast extent of ground over which jurisprudence ramifies. If it be considered as the "art of legislation," it includes the comparative study of all national histories. Thus, *e. g.*, the constitution of our own country, from its earliest foundation to the present time, must be analyzed and examined, especially in those periods when the great issues of liberty and the administration of justice were raised and determined in solemn form by the great councils of the state. The statutes concerning the liberty of the subject, parliamentary control over taxation, the assembling and constitution of parliaments, the authority of magistrates, the province of juries and other institutions of law, and those concerning the clergy and religion, must all be studied, for they discover the principles and embrace facts which belong to a portion only of the narration of our jurisprudence. But this includes the history of one corner only of the world, and during a brief moment in time.

The other section of the definition of jurisprudence is "the science of positive law." "In the positive law of every nation, there are two elements, the philosophical and the historical. The first element to be acknowledged is the philosophical. The absolute ideas of justice and truth constitute its essence. But these ideas assume different forms in different states. Prejudices, manners, and passions, change and deform them; and in law history becomes associated with philosophy. From this union the positive law of every state arises; and positive law becomes an association of universal principles and of national maxims, of rational axioms and of political adages."¹

We cannot fail to perceive that the vast range necessarily of jurisprudence must produce the appearance of diffuseness in treating its history. Its history must follow the schools of philosophy of Greece, the politics and literature of Rome, the origin and development of that great system which resulted in the compilation of the *Code, Pandects, Institutes, and Novels*. It must regard the revival of learning and of law in different countries of Europe during the middle ages, and pursue the social and political fluctuations of nations down to the present time. It is not possible, therefore, to sketch the important part of the history of the world without referring to a vast multitude of subjects either directly or by way of illustration. The author of such a work before us may therefore appear to make unnecessary discussions when he is only gathering up the numerous and dispersed threads which he must bring together in his hand if he would weave a true and well-combined account of jurisprudence. In Mr. Heron's concluding chapter he recapitulates briefly what he has been attempting in the work before us.

"I have attempted," says he, "to give an historical review of the great writers who have scientifically cultivated law. The general ideas of a science have been reduced to four heads:—to determine the particular object of the science; to distinguish the sciences which border on it, and to indicate the relations which

¹ Heron, p. 66.

it has to them; to divide and subdivide the science thus precisely defined; to give an historical sketch of the development of the science. These things yet remain to be done in the science of jurisprudence. Socrates, the first citizen of the world, commenced the political and ethical philosophy of Europe. Plato preserved in writing the opinions of Socrates. Aristotle analyzed the divisions of justice. But despotism and slavery corrupted the Grecian politics. The ancient Roman law is displayed to us as a blending to the popular and technical elements which exist in all the laws. Cicero combined the characters of the statesman and the lawyer; and his philosophy was used in Christian ethics by St. Augustine and other fathers of the church. The civil law of the Romans is to this day a portion of the legal life of every free citizen in Europe and America. But the consolidation of the law under Justinian, shows that the development of the Roman state and people had then ceased for ever.

"Six centuries after the complete codification of the Roman law, it began again to be cultivated in Italy. Irnerius, Accursius, and Bartolus represent the schools.

"In the sixteenth century, Alciatus and Cujacius established the French school of civil law.

"Machiavelli, in political jurisprudence, accomplished a grander reputation; and founded a school which, during the sixteenth and part of the seventeenth centuries, had for its dogma the right to use fraud in politics.

"Sir Thomas More introduced into politics the spirit of Christianity, which he attested by his martyrdom.

"The learned ecclesiastical jurists of the Spanish universities, Vasquez, Victoria, Soto, Suarez, in their laborious treatises on justice, collected the principles of natural law and of politics, as enounced by the fathers and schoolmen of the middle ages.

"Bodin, late in the sixteenth century, appears as the first great antagonist of Machiavelli; and in his 'Republic' discusses the divisions of politics and laws.

"With the commencement of the seventeenth century, Bacon extends the inductive method from physical to mental and political science. As such, he is the original discoverer of the principles leading to individual liberty.

"Grotius treated of the topics of civil right in relation to those federal and international relations which yet are imperfectly developed, but which in time will annihilate the powers of the individual governments now exercising authority over the nations of the human race.

"But whilst Grotius developed his lofty theories for citizens of the world, Hobbes scientifically analyzed the lowest laws of nature; according to which the inferior types of man always do

their best to injure strangers. In managing the lowest developments of society, the only possible government is a despotism.

"In England, during the seventeenth century, Culverwell, Zouch, Selden, Harrington, Sidney, Cumberland, and Locke, wrote on the law of nature and nations, or investigated other branches of civil or political right.

"Late in the seventeenth century the German school of jurisprudence originates with Puffendorf, is illustrated by Leibnitz, and has lasted in an unbroken chain of professors at the universities down to our own times.

"In the eighteenth century, Vico, Beccaria, and Filangieri represent the Italian school, and illustrate the progress of nations, punishment, and legislation. The spirit of laws is discussed by Montesquieu and the Encyclopædists. And the series of the French jurists ends with those who framed the Code Napoleon.

"The metaphysics of law are reviewed by Kant. Some of his definitions are the best in the science of jurisprudence.

"In Prussia, Stein and Hardenberg destroyed the feudal system, emancipated the serfs, and changed them into peasant proprietors of the land.

"I have treated the question of tenant-right as an illustration of the method of scientific inquiry into a political subject.

"Bentham and Savigny, the last and greatest writers on jurisprudence, close the series.

"Sir Samuel Romilly, Sir James Mackintosh, Sir Robert Peel, and Lord Brougham, in the present century, transferred to English legislation many of the scientific theories of Bentham.

"Lord Brougham, by his individual labours, has given a new impulse to the cultivation of the social sciences.

"Several political questions of importance at present prominently agitate the societies in which they are raised.

"Such are the questions of—

"Union amongst the races having the same national origin and speaking the same language on the continent of Europe—the questions of a united Italy, a Germanic empire, a Pansclavonic confederation,—

"Slavery in the United States of America,—

"Parliamentary Reform.

"All these being decided by legislation would accomplish social results. A social result is one that manifests itself in the collective life of societies, or which affects entire categories of individuals.

"Other purely legal questions are those which concern the machinery of law.

"Such are—

"Codification,—

"Abolition of taxes on legal procedure,—

"The reduction of the expenses of justice,—

"The reduction of the expense attendant on the transfer of property.

"The question of slavery may be treated scientifically in Europe. It scarcely can be so treated in America. Slavery in America will probably receive a great check from the immigration of the Chinese into the United States; but, if the Americans are to wait until free labour by its cheapness supersede slave labour, without the intervention of positive law, five hundred years may roll away, and slavery may still prevail.

"The only method for the abolitionists to pursue is to take a lesson from history. The use of science is to teach clever men to do rapidly what ages could with difficulty accomplish by the involuntary action of mankind. The domestic and prædial slavery of Europe gradually passed into serfdom. And in the course of many centuries, the slaves, who originally were treated as mere cattle, liable to be sold to foreign masters, became bound to the soil and irremovable from the estates upon which they were born. This change at once made an improvement in the slave's condition. The slave who for his life occupies a cottage and land, can accumulate and conceal property. The slave who is repeatedly during his life sold naked to a foreign master, has little chance of raising his condition above the beasts of the field. Let, then, North America bind her slaves to the soil. No immediate injury will be thus inflicted, except upon those persons who are engaged in the trade of breeding slaves for exportation. To them compensation may be awarded.

"These topics may serve as illustrations of discussion in the elevated regions of science."

"Largior hic compos æther et lumine vestit
Purpureo."

ART. X.—*Select Cases Argued and Adjudged in the High Court of Chancery during the time of Lord Chancellor Napier, in the Years 1858 and 1859.* By WILLIAM B. DRURY, Esq., Barrister-at-Law. Dublin: Hodges, Smith, & Co. 1860.

MANY a lawyer might, if he chose, confess that he has learnt more from a good case listened to or perused, than from many text-books and treatises. When he has seen legal principles applied, and, with relation to concrete facts belonging to living beings, discussed by real counsel in wigs, and adjudicated on by learned judges on benches, his attention is fully roused, and he has seen (it may be for the first time) the meaning and intent of what he may have often read about and thought vaguely upon. We are not here repeating the old saw, much dwelt upon, and often not unjustly, by learned counsel who profitably pursue the calling of taking in pupils to bait and stand at livery—that you must practise law to understand it; because we should have to qualify this judgment by saying, that learning the law by practice *only*, whether of another man's, or taking your own clients as living subjects, is open to censure, and would provoke comment which we are not here willing to employ. The proposition concerning learning to swim without going into the water would have to be discussed; and we might be called on to unfold the bearing upon this question of drilling, reviewing, and of practising soldiering, as a preparation for battle and campaign. But we do affirm, that to watch masters dissecting and demonstrating in public, is a most useful process for learners of the profession, whether professed students or counsel practising or ready to practice. Happily, the alternative is not between volumes of reports and volumes of commentaries and treatises, nor between the lecture-room, pupils'-room, and public court. He is the wisest student who, by his preliminary general education, has learnt how to learn, knows in what form intellectual

food nourishes him the best, and can combine in one diet the various productions which surround him. All we are concerned in here to observe is, that a good volume of modern cases is one of the most useful of adjuncts to the lawyer, young or old—unless, indeed, he be of that class who is too busy to read new cases, and only hears of them in consultation with his juniors, or in their Opinions; or, worst of all, for the first time in court during his elaborate argument.

We have spoken elsewhere in this Number upon the subject of legal reporting. A great many cases which find their way to the legal printing-press are ephemeral in their nature, and should be registered only as cases on procedure and reserved for books of practice. Of such a character is not Mr. Drury's selection from Lord Chancellor Napier's judgments in 1858, 1859. The value of a reported case depends upon three things—(1.) Its general nature: (2.) The excellence of the judgment: and (3.) The skill of the reporter.

Mr. Drury has wisely excluded from the volume before us those cases of a mere local character, or turning on the procedure or routine of the court, or depending upon the resolution of mere questions of fact; and he has selected those only which illustrate principles of equity, or enunciate the more important rules of jurisprudence. As regards the excellence of the judgments, the examples before us of those of Lord Chancellor Napier substantiate his claim to be considered as an eminent judge as well as able lawyer; for, be it remembered, it is very possible, unfortunately, for a good lawyer to be a bad judge. Most of these judgments were written—all were revised by the judge himself: they are somewhat unduly lengthy, perhaps, but their authenticity and accuracy have been secured. And lastly, as regards Mr. Drury's discretion and skill as editor and annotator, he seems to us to possess both these qualities in a high degree, and to have given to the profession a useful volume of valuable reports.

Mr. Drury has observed in his preface the strong and decided views which the Chancellor maintained on the construction of wills, which rendered it unnecessary for the editor to give a mul-

tiplicity of cases under that head. One of these cases is that of *Scott v. Clements* (p. 91), to which the editor has attached a foot note, where he explains the "decided views" of the Chancellor to which he refers. The Lord Chancellor, he remarks, has consistently acted on the opinion, that the interpretation of a will is to be sought and found in its own language; and he was wont to refer to decided cases for the general rules of construction only, or for the accredited meaning of certain legal terms and phrases. Recent cases in the House of Lords show, "that there are at present two schools of judicial interpreters, one of which makes frequent use of decided cases, the other abides more rigidly by the words of each will as its own interpreter, and declines to add or to vary these words, whenever they can be taken and understood in their ordinary sense without repugnance or inconsistency, even in a case where there may be strong reason to suppose that, if the testator's attention had been called to the exact import of the words used, he would not have adopted them as expressive of his actual intention." The case of *Grey v. Pearson* (6 H. of L. Ca., 61) is that in which the latter doctrine is clearly stated and unequivocally laid down; and with the view there laid down L. C. Napier cordially concurred. But in *Abbott v. Middleton* (7 H. of L. Ca., 91), Lord St. Leonards, it would seem, did not concur with the rules of construction acted on in *Grey v. Pearson*; ¹ which, therefore, must still be held not to be conclusively and finally settled.

We have formed, as our readers may perceive, a very favourable opinion of the judgments of the Lord Chancellor Napier. They stand in marked contrast, we regret to say, with the general run of the reported judgments in English courts of equity at the present time. The Irish Lord Chancellor attacks his case in a vigorous, uncompromising spirit; he seizes the principles and enunciates them without reserve, and applies them without timidity; he knows when to generalize and when to particularize. We do not see in him the feebleness which often develops itself in slipping off the main road to a by-path in search of a point on

¹ Vide also *Malcolm v. Taylor*, 2 Russ. & M., 447, per Ld. Brougham.

which to stick a judgment; nor does he pursue a small guerilla warfare on paltry detail, in preference to joining issue, in open and decisive battle, upon the true field where lies the dispute. In Wigram V.C., and Parker V.C., we have seen models of modern judgments in English courts of equity; which models, however, alas! have been less followed, it would seem, by the occupants of the English bench than by Lord Chancellor Napier.

It is to volumes like that of Mr. Drury, and those which contain the judgments of the two English vice-chancellors we have just named, that the student must turn for the best instruction, and the practitioner for the truest assistance.

ART. XL.—THE LAW AND EQUITY BILL.

A SMALL war is just now raging among the English juriprudents. An able writer in the *Solicitor's Journal*¹ assures us that it arises from an indulgence in "jealousy of rivals, which the Courts of Common Law have so frequently shown." Jealousy of rivals is so mischievous in its operations, that it would explain, if it existed on the *other* side, the unreasoning and unreasonable spirit which we think is being exhibited by the opponents of the Law and Equity Bill. This bad passion of jealousy, while it extinguishes in its victim the capacity for fair investigation, infects others, and spreads abroad all those distempers which are so unfavourable to the free exercise of the intellectual faculties. Every lawyer knows that the Law and Equity Bill emanated from the late Common Law Commission, and that it was the natural and necessary sequence to the two Common Law Procedure Acts, which have been tried and proved to be, of all practical

¹ June 23, p. 659.

reforms in modern times, the most salutary and successful. We presume that these two procedure acts were enacted without much opposition, because no marked jealousy was *then* visibly at work in the breasts of the commissioners. Mr. Bramwell was then modest, Mr. Willes single-minded, Mr. Martin cautious and considerate, Sir A. E. Cockburn equally industrious and unenvious. But time has ruined their dispositions, it would seem—or were they peradventure only masking the evil which nevertheless pervaded their souls, and artfully waiting for a fitting opportunity to spring their mine upon the enemy? Has this Law and Equity Bill afforded them occasion to rush forth to commit their dire treachery, and wreak their hatred on the Court of Chancery and its practitioners? We are confidently assured that the amiable doves of Equity are being hovered over by the hawks of Law. Hence the fluttering of the parchment wings of Lincoln's Inn, and the wailing of the outraged innocence of the Old and New Square. Another solution of the difficulty occurs to us: the various individuals of the Common Law Commissioners have reached high and well-deserved preferment since they first gave their valued services to the public; and now that they are sitting as judges, they find, perhaps, that they have so *little* to do that they are ambitious of drawing more business to their courts by robbing Equity of its jurisdiction. Peradventure, too, they may be anxious to try their 'prentice hands on subjects hitherto held sacred to Chancery, in order to appropriate some of the judicial glory which, however, has not been superabundant since the present undistinguished occupants of the Equity bench have succeeded those eminent judges, Lord Langdale, and the Vice-Chancellors Wigram and Knight Bruce. But however this envious and malicious state of mind, so imputed to the Common Law Commissioners and Judges, may be accounted for, there is no doubt that great differences have arisen upon the propriety of carrying out the provisions of the Law and Equity Bill. On the one side the Equity judges have ranged themselves, on the other the judges of the Common Law Courts. The counsel who practise in Equity believe that some of the business

hitherto confined to these courts may transfer itself to those of Common Law, and hence, naturally, self-interest suggests to them to view with disapprobation so misdirected a measure. On the other hand, Common Law barristers are audacious enough to believe that they are competent to undertake the work which the proposed changes will impose upon them, and covetous enough to wish to get the opportunity of enlarging the jurisdiction under which they practise. It is to be lamented that these elements of discord, which are neither pertinent to the question nor rational in themselves, have been introduced into the discussion. In point of fact, however, very few give themselves the trouble to investigate the right or wrong of *any* question. Opinion is generally formed on trust, which is extended to particular authorities according to prepossession, prejudice, habit, or supposed self-interest. We have already expressed our opinion strongly in favour of the entire principles and most of the provisions of the Law and Equity Bill—an opinion, indeed, not taken up or published now for the first time, but entertained constantly, and frequently repeated. The principles now questioned were, be it remembered, virtually laid down in the Report which led to the Procedure Act of 1854. If that Act had been passed in the form indicated by the Report on which it was founded, or even, in its present shape, had it been enforced *in its true spirit* by the judges of the Common Law Courts, many of the more important clauses of the present bill would have been rendered unnecessary. This is a fact familiar to those whose observation has been directed to the circumstances attending the Reform of the Procedure we are referring to, and the arguments and judgments which, during the last five years, have appeared in the Reports touching the interpretation of 17 & 18 Vict., c. 125.

The discussion has passed now into very competent hands; for the late Common Law Commission having been asked by the Lord Chancellor to report on the Equity Judges' paper of 'Observations,' which we gave in our last number (p. 159), and they having complied in a Memorial or Report, which is signed

by Cockburn C.J., Martin B., and Bramwell B., they have produced, it is needless to say, a most admirable paper, logical, conclusive, and powerful, standing out in marked contrast to that sent up by the Equity Judges¹ to the Lords, which was loose, captious, and poor. We proceed now to give our readers the reply of the Common Law Commissioners, which is valuable not only as being the leading feature of this particular discussion, but as a masterly exposition of the true principles which should govern jurisdiction.

*“Observations” of the Common Law Commissioners upon the
“Observations” of the Equity Judges² on the Law and Equity
Bill.³*

18th May, 1860.

My Lord,—Our attention having been called by your lordship to the objections urged in the Memorial of the Equity Judges against the bill introduced into the legislature on the recommendations contained in our last Report, with a view to our offering such answer as our acquaintance with the subject might suggest, we beg to submit the following observations in reply:—

We must begin by premising that the scope and effect of the alterations proposed in the jurisdiction of the Common Law Courts has been greatly misconceived, whilst the objectors appear to have lost sight of the extent to which equitable jurisdiction has already been conferred on these courts, as well as of the great improvements which have been introduced in modern times into their procedure.

In the sweeping criticisms with which our recommendations have been assailed, the proposal to confer further equitable jurisdiction on the Courts of Common Law has been treated as a scheme of innovation and demolition, now first propounded, and the incompetency of the Common Law Judges, and the inadequacy of their procedure to deal with equitable rights, has been taken for granted and unhesitatingly asserted, as though equitable

¹ The reader who wishes to see what can be said in legitimate criticism on the Law and Equity Bill, should turn from this weak and inaccurate paper to the *Solicitors' Journal* for June 16th and 23rd. Our contemporary, as usual, says what it has to say on the subject well and vigorously. It differs from us (and tells us so) on grounds which, though we do not admit them as sufficient, will be found well stated in its pages, to which we can now only thus refer.

² *Ante*, p. 147.

³ Laid by the Lord Chancellor before the House of Lords.

jurisdiction had never before been conferred upon, or exercised by, the legal tribunals of the country.

We shall have no difficulty in showing that, with a single, and that a very unimportant, exception, in no instance is it proposed to enlarge the equitable jurisdiction of the Common Law Courts, except where this jurisdiction already to some extent exists, and where the competency of these courts and of their procedure to administer it has already been established by practical experience.

It may not be inexpedient to pause for a moment, to take a brief survey of what has been already done in this respect.

The rigid simplicity of the ancient Common Law, and its strict and inflexible procedure, having proved inadequate to meet the exigencies of a state of society becoming every day more complicated and refined, and the legislature omitting to intervene to bring the law into harmony with the more liberal principles of rational and enlightened justice, Courts of Equity stepped in to supply the place of legislation, by the application of a rude yet not wholly inefficacious remedy—partly in eking out the defectiveness of the Common Law procedure, partly in mitigating the rigour of the law where an adherence to its letter would have worked injustice—not, indeed, by attempting directly to control the action of the legal tribunals, an attempt which would at once have been resisted, but by coercing the suitors by means of personal duress to forego their legal rights, and to submit to have justice done between them on equitable principles.

Experience, however, soon made men sensible, that the benefits of this equitable jurisdiction were greatly diminished by the drawbacks of double tribunals, and a twofold litigation, attended by a vast increase of expense. Hence, from time to time, during the last century and a half, according as particular inconveniences successively forced themselves on the attention of the legislature, portions of the jurisdiction at first exercised only by the Courts of Equity have been transferred by statute to the Courts of Common Law.

The power to relieve against the penalty of bonds conditioned on a defeasance, to relieve up to the time of trial against actions of ejectment on forfeiture for non-payment of rent, to relieve mortgagors in actions on mortgage bonds or actions of ejectment, on payment of the principal and interest, and the important process of interpleader, are examples of this transfer of jurisdiction.

To these instances of encroachment on the domain of Courts of Equity must be added the transfer, in our own time, of the whole of that extensive and important jurisdiction which was known under the name of "Auxiliary Equity." The powers included

under this head being wanting in the original procedure of the common law, Courts of Equity, as has already been observed, took upon themselves to make good the deficiency. Better this, no doubt, than that such powers should nowhere be found for the protection of right; yet so great the evil that a court in which a suit was pending should not have the means of doing justice between the litigants; so great the hardship of being compelled to resort to a second court to supply the defects in the procedure of the first; so serious the harassment, and above all, the expense of the double proceeding, that the remedy was often more grievous than the absence of redress; and parties, especially of the poorer sort, more particularly where the matter in dispute was not of large amount, preferred to submit to injustice rather than have recourse to a remedy oftentimes far worse than the mischief to be cured. When, therefore, the Common Law Commissioners recommended the transfer of these powers to the courts of law, parliament at once saw the propriety of the suggestion, and gave effect to it by legislative enactment. Yet the same argument might have been urged then which is resorted to now. The powers which it was proposed to confer on the Common Law Courts were powers which the Courts of Equity for many generations had exclusively exercised, according to principles and rules with which, so far as their practical application was concerned, the Common Law Judges could not be expected to be familiar. Yet these powers have now been extensively exercised by the Common Law Courts to the infinite advantage of the suitors. The judges have had no difficulty in familiarizing themselves with the principles and rules established by the practice of equity in this department; and the machinery of the Common Law has proved itself abundantly adequate to the exigency of the occasion.

It may safely be asserted that, owing to the increased facility and diminished cost of the present mode of proceeding, for every instance in which resort was had to a Court of Equity under the old system, hundreds of instances now occur in which the corresponding powers of the Common Law Courts are called into action, and are found fully effective for the purpose.

The innovation introduced by the legislature into the established jurisdiction of the different branches of our judicature did not, however, end here; and assuredly a further and a great change was imperatively called for.

The existence of two conflicting systems of law, recognizing inconsistent and incompatible rights, the one called Common Law; the other Equity, administered by two distinct sets of tribunals, each refusing to give effect to rights which would be enforced by

the other, is not only an anomaly in jurisprudence, but has been found to be attended with practical inconvenience and mischief of the most serious character. That a plaintiff, who has brought his action in a court of law, the only court to which he could resort, should be liable to have his action suspended, or the fruits of the judgment he may have obtained withheld, while he is compelled to follow his opponent to a different tribunal on an allegation of equity ; or, still worse, that a defendant, sued in a court of law, and having a valid defence on equitable grounds, though none at law, should be under the necessity, instead of at once setting up such equitable defence as an answer to the action to resort to another court, and there initiate a new and costly proceeding, at an expense in many instances immeasurably disproportioned to the value of the matter in dispute, was a judicial grievance and abuse, which neither time nor authority could sanction, and which, as soon as the work of legal reform was undertaken in a large and earnest spirit, neither prejudice nor interest could defend, so far as to resist some modification of the evil.

When, therefore, in our second report, we had gone the length of recommending that jurisdiction should be given to the courts of law to entertain considerations of equity when arising incidentally in an action at law, the legislature, although it did not see fit to give full effect to our suggestions in respect of equitable jurisdiction, yet took the very important step of enacting that equitable defences might henceforth be pleaded in an action.

Here, again, it may be observed, that almost all the arguments which are now urged against the extension of jurisdiction at present proposed, would have been equally applicable to the change then introduced. The best answer to them is, we think, to be found in the practical experience of the working of this equitable jurisdiction, which has been exercised by the common law courts for now six years. It is from our experience of the usefulness of this jurisdiction, so far as it extends, from our persuasion that its only defectiveness arises from its not being sufficiently extensive, as well as from our conviction that, if the jurisdiction were enlarged, the courts of common law possess ample machinery for working it out, that we have been led to urge the expediency of extending the sphere of equitable defences in actions at law.

It will be convenient to divide the subject of the equitable jurisdiction proposed to be conferred by the bill into two branches : 1. where the jurisdiction proposed to be enlarged or conferred arises on an action pending ; 2. where it is to be exercised independently of an action.

EQUITABLE DEFENCES.

In the first branch equitable defences occupy the most prominent place. Equitable defences being now admissible in an action, a class of cases has arisen in which, although the defendants were desirous of pleading equitable pleas, a practical difficulty presented itself from the equity being conditional on something to be done *in futuro*, or on a contingency. Such a plea, a court of law could not, in the exercise of its discretion, allow to be pleaded; inasmuch as the plea once found for the defendant would be a bar in all time to come to the plaintiff's right, while the Court would have no power to compel the performance of the condition on which the equity arose. Now, it is plain that, if this difficulty can be removed, the same reason exists for permitting an equitable plea of this nature to be made available in an action, as exists where the equity is unconditional and complete.

If the condition had been performed, we have the sanction of the legislature for saying that the equitable plea should be allowed. If the performance of the condition can be ensured, there can be no conceivable reason why the defendant, who is willing to perform the condition in order to obtain the benefit of the equity which would so result to him, should be driven to a court of equity to establish his defence. Of course, this is said on the assumption that a court of common law would be able, from the competency of its judges and its officers, to ensure the due and effectual performance of the condition. To doubt of this would be, as it seems to us, to doubt of their competency to administer the law at all; and we cannot bring ourselves to suppose that any serious resistance can be offered to the proposed amendment on this ground. It seems to us to follow from what has been said, that conditional equity be made available as a defence in an action at law, just as unconditional equity already is. Whether this should be done by an application for relief to the court in which the action is pending (as proposed by the Bill), or by allowing such an equitable defence to be pleaded, and giving the Court power, if the plea should be found for the defendant, to enforce the performance of the condition, on the application of the plaintiff, may be open to consideration.

INTERPLEADER.

The next instance in which it is proposed to give jurisdiction in respect of equitable matter is the case of interpleader. It is of every day occurrence that, money or goods being in the hands of persons not claiming beneficial interest therein, or goods being seized by sheriffs in executing the process of the courts, adverse

claims are set up whereby persons thus circumstanced are placed in an embarrassing position, and are exposed to be harassed by actions, and subjected to eventual loss. It is plain that persons so circumstanced ought, in justice, to be relieved, on actions being brought against them, by the parties claiming the beneficial interest being put to fight out their claims. Formerly this relief could only be obtained by interpleader bill in equity, a proceeding which, as the statute of 1 & 2 Will. IV., c. 58, recites, was "attended with expense and delay."

By this statute interpleader jurisdiction was given by the courts of law. But this jurisdiction does not attach where the *jus tertii* set up is founded on equitable right. This jurisdiction it is now proposed to give. It cannot be contested that an innocent party, thus placed between two fires, ought equally to be relieved in the case of equitable as of legal claims. The expense and delay to the party against whom the adverse claim is set up by the institution of fresh proceedings in equity is, of course, equally great. The action is already in the Court of Common Law, and the reasons against the double litigation apply as strongly in this as in other instances. The object ought obviously to be to place the case on such a footing that the action shall become one between the parties really interested. Now, if the action were between the real parties, as, for instance, between an execution creditor (on a seizure of goods by the sheriff) and a party setting up an adverse claim, instead of between the claimant and the sheriff, an equitable right of the claimant would be available to him against the plaintiff under an equitable plea, without recourse to a court of equity. But if, in an ordinary action of trover between A. and B., any equitable rights of the defendant as an answer to the action would be cognisable by the Court, it seems difficult to understand why, when it is sought to bring A. and B into their proper position as litigants, at the instance of a party entitled to interpleader relief, the equitable nature of B.'s interest, which would be cognisable by the Court if A. and B. were once before it as plaintiff and defendant, should be a reason for withholding from the Court the power of granting such relief, and for putting the parties concerned to the vexation and expense of a fresh suit before another tribunal. In addition to which, another and a very cogent reason for extending the process of interpleader to such cases, is to be found in the fact, that the setting up of adverse claims by third parties generally, arises on the seizure of goods by sheriffs in execution on process from the common law courts. To these officers Courts of equity, as was pointed out in our late report, have refused relief by interpleader, while on the other hand they are liable to hostile pro-

ceedings if they omit to take possession of property according to the exigency of the writ of execution.

FORFEITURE.

Next, as to the proposal to extend the jurisdiction first conferred on the common law courts by the Act 4 Geo. II., c. 28, in an action of ejectment brought on a forfeiture for non-payment of rent. By that statute the equitable power, previously exercised by Courts of equity alone, of relieving the tenant on payment of the rent due, was given to the court in which the action is brought up to the time of trial. Relief may be obtained in equity for a further period of six months after execution; but to obtain the latter relief fresh proceedings in equity must be taken. The simpler course would surely be to allow the court in which the action has been brought to afford relief to the same extent as a Court of equity can afford it. The record is in the former court; the facts are before it; the application may be by motion on affidavit; the expense of a second suit in a different court, with a fresh statement of facts, and perhaps fresh proofs, will be avoided. Nor can any possible ground be suggested, as far as we are aware, why the court which is thought competent by the Legislature to give relief up to the time of trial, should not be equally so after trial.

In like manner we cannot but think that the power conferred on a Court of equity by the 22 & 23 Vict., c. 35, s. 4, to relieve against a forfeiture on a covenant to insure, where no loss has occurred, and the breach has been committed by accident or mistake, or otherwise without gross fraud or negligence—and a policy is, in fact, in existence, such as the covenant requires—might advantageously be extended to courts of common law, at all events when an action has been brought on the forfeiture. It must, we apprehend, be at once conceded, that the questions involved are peculiarly within the province of a common law court; and there seems to be no conceivable reason why a second suit should be necessary to afford the defendant protection.

OMISSION TO PLEAD EQUITY.

We pass on to the more important question, whether a party to an action who has once had the opportunity of pleading equitable matter, and who has not availed himself of it, shall be concluded by the omission—as he would have been by the omission to plead matter available at law if his case had rested on legal grounds—so as to preclude him from afterwards resorting to a Court of Equity to defeat the action.

The affirmative of this proposition appears to us to follow of

necessity, the moment equitable matter is permitted to be introduced at all into the action at law. The argument that a plaintiff who has necessarily commenced his suit in a court of law ought not, at the option of the other party, to be dragged before some other tribunal, applies equally at whatsoever stage of the suit this anomaly arises. Indeed, the later the stage of the proceedings the greater and more grievous the hardship; inasmuch as, if the equitable right should eventually prevail over the legal, all the expense of the action which may perhaps have involved a trial at *Nisi Prius*, and may have proceeded even to judgment and execution, will have been entirely thrown away. Added to which, it seems repugnant to justice that a party shall be thus permitted to fight out his cause with his adversary, on one stage, and having there taken his chance of success, shall be at liberty, when defeated, to renew the conflict on a different ground, which, if rightly taken at first, would have prevented the prolongation of the original contest; while, if the equitable ground be wrongly taken at such latter stage, the effect is necessarily to delay the party who has succeeded in the contest at law from reaping the benefit of the decision in his favour.

It is unnecessary to dwell on the various grounds on which the salutary rule is based, that in judicial proceedings litigant parties must put forward their respective cases, whether of attack or defence, at the proper stages of the suit, or be concluded by their omissions; as well as that judgment once pronounced in the last instance shall be final and conclusive. They may be summed up in a word: without this rule litigation would be interminable, nor could rights ever be definitively ascertained or securely established. It is obvious that this principle applies equally to the case of equitable as of legal defences; and it seems to us to follow that, if matter or equity is allowed to be pleaded in actions at law, and a court of common law is to have jurisdiction in respect of such matter at all, it should be obligatory on the party relying on equitable grounds to put them forward at the fitting time, just as it would be to bring forward matter of law; and that a party omitting to take his stand on equitable grounds which it was competent to him to bring forward in the action, ought not to be allowed afterwards to harass his opponent by a renewal of the litigation by proceedings in a Court of Equity.

NEW TRIAL.

It is obvious that much of the foregoing reasoning applies to the bill in equity for a new trial, by which, after trial and judgment in a court of law, on the discovery of new matter, though amounting only to a defence at law, relief may be applied for in

a court of equity after the expiration of the time within which a new trial could be applied for in the court in which the action has been brought. It seems to us plain that this is an inconsistency which ought to be removed. If the time limited in the court in which the action has been brought and the trial had, is too short, that time should be extended. But it seems a startling anomaly that when the court in which the action had been properly brought has pronounced its final judgment, a second court, not having any appellate jurisdiction over the first, may take the cause in hand, try the whole matter over again, deprive the victorious suitor of the judgment he has obtained, and decide in favour of the opposite party!

The only objection to our recommendation in this respect, so far as we are aware, has been the denial of the existence of such a process. This, however, is a mistake. The proceeding has, as was stated in our third report, fallen into disuse, but there is nothing to prevent its being revived. The weapon may have been laid aside and may have grown rusty, but there is nothing to prevent its being again brought forth and made an instrument of mischief. The forensic combatant will not have to search far or deep to find it. In two text books of the profession, namely, "Mitford on Equity Pleading" (p. 131) and "Story on Equity" (§§ 887, 888), the bill of new trial is treated of as an existing part of equity procedure, and its terms and conditions prescribed with considerable detail. The jurisdiction is treated as an existing one, nor is it suggested that, if again invoked, it must not be exercised. On reference to these authorities it will be seen that where a bill of review in respect of a suit in equity may be brought, the bill of new trial upon judgment in an action at law may be resorted to. Acting upon such authorities we deemed it our duty to direct attention to this conflict of jurisdiction, and to suggest the expediency of cutting off the possibility of its practical recurrence.

INJUNCTION.

We next proceed to consider the proposal to give to the Common Law Courts power to protect by injunction property, whether real or personal, the title to which is in contest in an action at law, from alienation, waste, or injury, till the right shall have been determined.

We must, in all humility, confess that we are at a loss to conceive that any substantial objection can be offered to a proposal so obviously reasonable.

It is plain that such a power should exist somewhere. A man in possession of land, the title to which is contested, *a fortiori* a

man in possession without a title, ought not to be permitted, pending proceedings to eject him, to commit waste to the damage of one who claims a better title. A man who is in wrongful possession of a chattel, for the loss of which money may be a very inadequate compensation to the rightful owner, ought not to be left at liberty to make away with it while an action for its recovery is pending.

At present, protection in this respect can only be obtained by recourse to a court of equity, while the recovery of the thing itself can only be effected in a court of law; two suits, with twofold expense, where one would suffice!

And no question can here be raised as to the competency of the tribunal.

It would be strange indeed, if it could be doubted that the Court which, in an action of ejectment or detinue, has to determine the right to the corpus of the estate or chattel, was also capable of deciding whether the defendant should be restrained from committing waste, or making away with the thing in dispute until the right was determined.

We now pass on to consider the instances in which it is proposed to confer new jurisdiction on courts of law irrespective of any pending action.

And, first, as to the proposed power of restraining by injunction the impending violation of any legal right. We must here beg it may be borne in mind that it is not proposed, in this branch of the subject, to confer on courts of law powers in respect of any rights which are not strictly of a legal character. Throughout the contemplated amendments it has never been proposed, where title to property was complicated by equitable rights, to withdraw the decision from the courts of equity. This being kept in view, we must confess ourselves altogether at a loss to conceive why, when legal rights alone are involved, a court of law, whose special and proper province it is to determine such rights, should be without power to protect them from violation. And it must be observed, that this anomaly in our judicial system is rendered the more striking and discreditable to our jurisprudence by the partial jurisdiction already extended to the legal tribunals by the Act of 1854.

As the law now stands, if a single act of wrong has been committed, a court of law, on an action being brought, has power to grant an injunction to prevent a repetition of the wrong. If a nuisance were about to be created which would seriously lessen the value of a man's property, as, for instance, if a local board were about wrongfully to bring the main sewer of a district close to a man's premises, no protection could be afforded by a court of law.

But if the thing has once been done, and the whole expense incurred, not only may damages be recovered for the present injury, but the nuisance may be abated for all future time. If, out of a thousand trees growing on an estate, a single tree be wrongfully cut down, an injunction may be obtained from a court of law to prevent the cutting down of the remaining 999. But if, with the certainty of impending injury, the party whose rights are about to be invaded should come to a court of law for protection before the axe has been laid to the root of the first tree, he would be told that while, if he had waited till one tree was cut, the court would have protected him as to all the rest, the Legislature has not thought fit to intrust the court with powers for the protection of the first, but has committed that to the exclusive keeping of a Court of equity. We cannot but think that this state of things (arising as it does out of the partial manner in which the recommendations of our second report as to injunction were carried into effect) is an anomaly in our judicial system which almost borders on the ludicrous, and is a serious reproach to our legislation.

We must be forgiven for saying, that we cannot comprehend the alarm which the proposal to remove it has occasioned. The jurisdiction is one which, reference being had to the subject matter, falls properly within the province of the common law courts. It is one which these courts already possess and exercise in an ulterior stage. The competency of the courts or of their procedure cannot come into controversy. The question has been concluded by the legislature itself in conferring powers which presuppose all the qualifications, both in the judges and their procedure, which are necessary for the exercise of those now proposed to be given. We cannot but think that the objection to this extension of jurisdiction, has arisen principally from its having been overlooked that it is only proposed to confer it where damages can now be recovered in an action, and where, therefore, strict legal rights are involved, and that the powers proposed to be conferred by the present Bill are neither more nor less, in substance and degree, than those created by the Act of 1854: the difference consisting simply in this, that they may be exercised before the mischief instead of after it has commenced.

DOCUMENTS.

The only other instance in which authority is proposed to be given to a court of law, independently of a pending action, is the power to order the delivering up of documents which, on the face of them, appear to give a right of action at common law, but which, by reason of circumstances which, if an action were

brought, would constitute a defence, ought not to be available, and, on the contrary, ought to be given up or cancelled.

The ground on which a party liable to be prejudicially affected by such a document has a claim to have it given up or cancelled, is that the document, remaining in the hands of the opposite party after all just claim to enforce it is gone, may one day be brought forward, after the evidence by which it would have been defeated has ceased to exist.

It is plain that power to afford relief from such a possibility, and to protect a person so circumstanced from having such a danger from hanging over his head for years, ought to exist somewhere. It has hitherto been confined to courts of equity alone. The reasons for proposing to extend it to the courts of law, are, first, that the documents in question would be enforceable in a court of law alone; secondly, that the matter of defence, on which the claim to have the document annulled arises, would be capable of being pleaded and tried at law if an action were brought upon it; thirdly, that the common law procedure for trying the facts, if contested, is indisputably superior to that of a court of equity.

NEW EQUITABLE JURISDICTION AT LAW.

We have now passed in review the several cases of equitable jurisdiction proposed to be conferred by the Bill. It remains for us to deal with a few general objections put forward against the measure as a whole.

The principal of these is founded on a misapprehension which it is important to clear up. It seems to be supposed that equitable title to property is sought to be brought within the jurisdiction of the legal tribunals. This is evidently pointed at in the two cases, prominently put forward in the objections of the equity judges, in which fraudulent plaintiffs with legal titles are supposed to bring ejectment in a court of law for the purpose of avoiding the discussion of adverse equitable rights before an equity court.

This is a very serious misapprehension. It overlooks the fact that, with reference to equitable defences, the action of ejectment—the only action in which the right to real estate can be enforced—was not included in the Act of 1854; and that, with the exception of the comparatively small matter of relief from forfeiture for nonpayment of rent and for omitting to insure, this action is not proposed to be touched by the present Bill. So large a proportion of property in this country being held in trust, and trusts being the peculiar province of courts of equity, however serious the inconvenience arising from the occasional conflict of jurisdiction may be, it is not proposed that powers should be given to courts of law to entertain equitable considerations on a trial

of title. If our last report be referred to, it will be seen that our recommendation as to the power to grant conditional relief is confined to cases in which equitable defences are already admissible, but in which the presence of a condition prevents the court from entertaining the plea. This, of course, does not apply to ejectment, in which no equitable plea is admissible. The present Bill does not include ejectment, so far as title to property is concerned. The imaginary cases put forward by the equity judges as illustrative of the mischievous operation of the enlarged equitable jurisdiction could not therefore possibly arise.

We cannot but think that much of the opposition offered to this measure has been founded on the notion, that it was sought to withdraw by it questions upon equitable title to property from the jurisdiction of a court of equity. It is desirable that this misapprehension should be dispelled as speedily as possible. No such thing has been suggested, or is contemplated by the present measure. Of course, if it should be thought that the language of the Bill leaves room for the possibility of a different construction, nothing would be more easy than so to frame the enactment as to limit its operation to the extent designed.

Another objection insisted on by the equity judges is, that a plaintiff having a mere legal as opposed to an equitable right will now have a choice of courts, and will naturally take his cause to the court in which equity is the least likely to be well administered. Assuming for a moment the inferiority of the legal courts in dealing with equitable questions (on which a word presently), we must be forgiven for observing that this argument rests on a fallacy. A plaintiff having only a legal right to insist on has no choice of courts; he can bring his action in a court of law alone. If he went to a court of equity, he would be told that, having a remedy at law, he had no business there. The position of such a plaintiff will nowise be altered. But let us look to the other side of the case. Take the case of an honest plaintiff bringing an action on a legal claim, which he believes to be well founded. Having brought his action in the only court to which he can resort, why, because his adversary sets up an equitable defence, is he to be forced to become defendant in a new suit before a different tribunal? Or take the, perhaps, still more striking case of a defendant in an action at law, having a defence on equitable grounds alone, which he is desirous of setting up in the court where the action is pending. Why is he to be driven to the necessity of going to a second court, and there instituting a second and more expensive suit? Why, if his equity depends on the performance of some condition, is he to be driven to another court to obtain the relief which performance of the condition might just as well secure to him in the first?

The equity judges assert that "no solid reason can be given for the proposed transfer of jurisdiction." We, on the other hand, submit that abundant reason is to be found in all the evils attending on a double jurisdiction and a twofold litigation—two suits relating to the same subject-matter of dispute, in two separate courts, separate pleadings, separate sets of counsel, fresh fees of court, all harassment, expense and delay of a suit in chancery needlessly superadded to the similar proceedings of an action at law. Surely, it cannot seriously be disputed that if the necessity for resorting to a second court can be dispensed with—wherever justice can be done in one court and one suit—there is every reason for relieving the suitors from the inconvenience, the expenses, and the delay of a double litigation.

We guard ourselves by saying "where justice can be done." We readily admit that where what the objectors not inaptly term the "machinery" of the courts of common law is inadequate to deal with questions of equity, a sufficient reason exists for maintaining the divided jurisdiction. We admit that, to a certain extent, the objection to conferring equitable jurisdiction on the courts of law on this ground is well founded. But to this extent care has been taken that the jurisdiction shall not be exercised. The objection becomes unfounded and unjust when it overlooks a distinction which the framers of the Bill have not been unmindful to observe. It is true, as is urged by the equity judges, that there are cases in which equitable rights cannot properly be determined, without more parties being brought before the court than the parties immediately in presence in an action at law. It is true that a court of law has no procedure for bringing such further parties before it. Possibly it may not be desirable that it should have. Actions to recover real property excepted, as to which the present question does not arise, the cases which come before courts of law are seldom of sufficient magnitude to make the multiplying of parties desirable; as the so doing, however necessary in order to settle the rights of all concerned, has a natural tendency, except where great interests are involved, to bring about the result that, by the time the rights of all parties concerned are adjusted, there remains but little to be divided amongst those who are found to be entitled. Be this as it may, the objection of the equity judges, founded on the inability of the common law courts to bring other parties before them, has, as regards the present measure, no application. It is not proposed to admit equitable defences in cases to which the objection relates. By the operation of the 86th section of the Common Law Procedure Act of 1854 and the 12th clause of the present Bill, courts of law will not be called upon to entertain questions of

equity where the equitable rights of parties other than the immediate parties to the action at law are involved. It is suggested, indeed, that a court of law might fall in error in deciding whether, in any particular case, the equitable rights of other parties do or do not come into question. But it may be answered, first, that in the more simple cases of equity which present themselves in actions at law, no serious difficulty on this score is likely to arise; secondly, that the supposition that the judges would have any difficulty in deciding such a matter is an assumption of incapacity in them which ought not lightly to be made; thirdly, that the objections, if good for any thing, would apply equally to the equitable pleas already permitted to be pleaded; lastly, that in the exercise of the existing jurisdiction no such difficulty has in point of fact been experienced.

MACHINERY.

The question as to the adequacy of the "machinery" of the common law courts being thus reduced to its proper limits, we have no hesitation in affirming that the procedure of these courts, enlarged and amended as it has been in modern times, is abundantly sufficient to enable them to exercise the powers proposed in a perfectly satisfactory manner.

With reference to matters of equity brought forward in pleading, no question as to the adequacy of the procedure can arise. The facts on which the equity arises being set forth in the pleading, the effect of them, if admitted, is at once for the court. If not admitted, the facts will be tried by a jury in the ordinary way. And it may be here incidentally observed, that if in the same action there should also be issues of facts relating to matter of common law to be tried, it is more convenient that both sets of issues should be tried and disposed of in the same inquiry, than that one set of facts should be tried in a court of law, the other in a court of equity. No one, we apprehend, will question the superiority of the common law procedure over that of equity for the trial of issues of fact; and it may be observed in passing, that as, in the discussion of questions of equity, where-soever they may be raised, questions of disputed fact will frequently arise, this superiority of the common law procedure for the decision of questions of fact is so far in favour of the transfer of jurisdiction.

As regards equitable matters arising on application to the court, as for relief on conditional equity, or for protection of property, either on apprehended injury or during the pendency of an action, the efficiency of the machinery cannot seriously be questioned. The application would be by motion founded on an affidavit

setting forth the facts. If any difficulty should arise in the ulterior stages of the discussion, the court would have ample means of completing the inquiry by an issue or reference to a master. The only difference, we apprehend, between such a proceeding and that of a court of equity would be, that the latter would require a written or printed statement of the case, which would be echoed by an affidavit. The common law process, while it is equally efficacious, is the simpler and less expensive of the two.

The question of the competency of the common law judges to administer equity is one which, for obvious reasons, we are reluctant to touch. We may, however, be permitted to observe that in the simpler questions of equity, which are likely to come before courts of common law, we cannot anticipate any serious difficulty. While, on the one hand, it may be admitted that, where more complicated rights are involved, such as arise upon intricate questions of real property, of trusts, the administration of estates, and the like, the principles and rules of equity constitute an elaborate and special system of jurisprudence, a perfect knowledge of which it may require special study and practice to acquire, yet it must not be forgotten that one of the principal merits of this system is that its leading rules—at least, where unembarrassed in their application by the intricacies and subtleties of real property law—rest on the plain and simple principles of rational justice, as distinguished from the more technical and arbitrary rules of positive law.

More especially is this the case with reference to the grounds on which equity relieves against legal rights sought to be enforced in actions at law. To suppose that common law judges or practitioners either are acquainted with or will be unable to master a system so simple, would seem to be a gratuitous and unwarranted assumption. No such difficulty has hitherto arisen in administering the powers either of auxiliary or substantive equity heretofore conferred. So far as we are aware, one instance only has occurred of an appeal from the decision of any court of law on an equitable plea, and in that instance the appeal was unsuccessful.

We believe the apprehension of incompetency in this respect to be wholly unfounded. The large knowledge of the law, essential to the administration of equity, has never been questioned in equity judges; and we are at a loss to understand why credit should not be given to common law judges for capacity to possess a corresponding knowledge of equity in the limitation of legal rights. When we reflect how many of the great equity judges who have presided in the Court of Chancery and in the House of

Lords have been taken from the common law courts, we are surprised that capacity should be denied to the collective ability of the common law judges, assisted by a bar inferior to none in learning and attainments, to deal with the simple questions of equity which are likely to arise incidentally in proceedings at law.

Before we quit this subject, we must advert to an argument prominently put forward, namely, that the effect of thus conferring equitable jurisdiction on common law courts, will be to restore in substance the ancient equity jurisdiction of the Court of Exchequer, abolished in recent times by the Legislature. That this view of the matter is altogether erroneous may readily be shown. It assumes that the jurisdiction of the Court of Exchequer as a Court of Equity was exercised by it incidentally to proceedings pending before it as a court of law. Nothing can be more incorrect. The Court of Exchequer in equity was as distinct from the Court of Exchequer as a court of common law, as the Court of Exchequer now is from the Court of Chancery. The jurisdiction was distinct; all suits were distinct; the procedure was distinct; the officers of the court were not the same; the practitioners were a separate and distinct class. A party seeking protection or relief from an action pending on the common law side of the court, was obliged to file a bill in equity, and was in all respects in the same position as if he had gone into chancery. All the evils of the double jurisdiction arose, without any of those benefits which may be anticipated from enabling full justice to be administered in a single court. Other causes, therefore, making it desirable that the Court of Exchequer as a Court of Equity should be done away with, its abolition took place, but without the slightest reference to any inconvenience arising from a blending of jurisdiction such as is now proposed. To represent the two cases as analogous is to confound things essentially distinct and having nothing in common but a name.

COURT OF APPEAL.

Lastly, as to the objection taken to the measure with reference to the proposed Court of Appeal. It is said, "the appeal is to be a court of error—a very competent tribunal for determining the points of law which remain when a jury has solved the questions of fact, but rigid in the extreme in its rules of procedure, and utterly incompetent to dispose of the mixed questions of fact and law that continually arise on appeals from courts of equity." We have here again a serious misapprehension. It is assumed that the Court of Exchequer Chamber, the proposed Court of Appeal, will be simply a Court of Error in the strict sense of the term; that is to say, a court confined to error appearing on the face of the record, and bound by some rules of procedure differing

from those of the court in which the proceedings originated. This is an entire mistake. The Court of Exchequer Chamber, when exercising the appellative functions conferred upon it by the recent Procedure Acts, is no longer a mere Court of Cassation. It is a Court of Appeal in the fullest sense of the term ; that is to say, it is invested with all the powers, both as to substantive law and procedure, which are possessed by the court from which the appeal comes, and can even draw inferences of fact where the court below could do so.

While upon this subject, we cannot but express our surprise that the objectors should have overlooked the fact, that from the decisions of the Court of Exchequer Chamber on appeal there is an ulterior appeal to the House of Lords, where the presence of so many equity authorities will secure the correction, if necessary, of the decisions of the common law tribunals, and ensure the administration of equity according to its established and undoubted rules.

We conceive that we have thus made good the propositions which we undertook to establish ; that, starting from the incontestable position that every court should have power to carry on a suit properly commenced in it to final adjudication and completion, as also to protect rights which are clearly within the compass of its jurisdiction, we have shown that the powers which it is proposed to confer on the common law courts, are essentially necessary to this end ; that they have been already partially given, and so far beneficially exercised ; and lastly that, so far as it is now proposed to go, the procedure will be fully equal to the purpose.

CONCLUSION.

The equity judges declare, that " no attempt should be made to alter our tribunals until a careful revision has been made of our whole law." But is not this to put off the work to the Greek Kalends ? We readily agree that the bringing the conflict of law and equity into unison would be better dealt with as a part of the substantive than of the ancillary law ; and would be best effected by abrogating from the body of our law rights which ought not to be, and which equity does not allow to be enforced, instead of by seeking to attain the end by a fusion of jurisdiction and procedure. But who is there among us so sanguine as to expect that this great work of the revision of the whole body of our law will be undertaken, much less accomplished, in our days ? In the mean time the suitor, bandied to and fro from law to equity, and from equity to law, suffers what he feels and knows to be— with whatever complacency legal practitioners may from habit be

brought to look on the matter—a practical and substantial grievance. To whatever extent, though it may be but a partial one, that grievance can be abated—to whatever extent the great desideratum of uniformity in the law as administered by the judicial tribunals of this country can be effected—to that extent, at least, the practical good should be secured, although the means resorted to may not be such as a scientific jurist might deem the most eligible. At all events, if any immediate, though but partial, remedy can be applied, it would surely be unwise to refuse to accept it because it is not presented as a part of a general revision of the whole body of our laws, of which no reasonable hope presents itself even in the indefinite future.

We have the honour to remain, my Lord, your obedient and faithful servants,

A. E. COCKBURN.

SAMUEL MARTIN.

G. BRAMWELL.

The Right Honourable the Lord Chancellor.

It remains for us now to add, that the Law and Equity Bill was referred to a select committee of the Lords, some of whom were competent, and others utterly incapable, of doing any good to any measure legal or general, and the latter were unhappily in the majority. Induced by Lord Chelmsford, this very select committee struck out, as might be expected, some of the most useful clauses. What the Commons will do with it remains to be seen. They may possibly acquiesce in the botching, or add to it.

Lord Chelmsford is not by any means happily situated among the hereditary legislators. When in the House of Commons, his *Nisi Prius* occupation and aptitude as an advocate prevented him from interfering with legislation for good or for evil. But now, he unfortunately employs his leisure by indulging his somewhat superficial powers to the detriment of useful measures, and the imposing others of a foolish description upon the notice of the House. Lord Brougham informed the House how, in opposition to his own and the Chancellor's desire, the bill had been spoilt, and he expressed his hope that, as on previous occasions, the Lords would learn better when the clauses struck out were again presented for their acceptance.

THE BAR EXAMINATION QUESTIONS.

TRINITY TERM, 1860.

Questions on Constitutional Law and Legal History.

1. At what period and by whom were the Representatives of Boroughs first summoned to Parliament?
2. State any proofs of the increasing authority of Parliament between the accession of Edward the Third and the death of Henry the Fourth.
3. How was the right to sit in the House of Lords conferred during the reigns of the Plantagenets?
4. Can you quote the testimony of any English writer to the freedom of the English people before the reign of Henry the Seventh?
5. Of whom did the King's ordinary Council consist during the Plantagenet dynasty, and what was the business of it?
6. To what Statute do you assign the origin of Estates Tail?
7. Give an account of the Statute "Quia emptores."
8. When was the power of making a will disposing of all his property not entailed first given to the English subject?
9. Mention any interference with the prerogative by the Judges in the reign of Queen Elizabeth.
10. Since when has the right of deciding on the validity of Elections been finally settled in the House of Commons?
11. When was the question as to the validity of General Warrants finally decided?
12. What was the injustice remarkable in the Trial of Sir Walter Raleigh?
13. Give an account of Bates's case.
14. When was the Petition of Right drawn up, and what was the object of it?
15. How many witnesses were required to establish a charge of Treason in the reign of Charles the Second?
16. Give an account of the Bill of Rights.
17. When was the Act of Settlement passed, and what were its chief provisions?
18. What attempts were made to exclude placemen from the House of Commons in the reign of William the Third?

19. When were Catholic Peers excluded from the House of Lords?

20. What Laws were enacted against Dissenters in the reign of Charles the Second?

21. Give an account of Bushel's case.

Equity.

1. Can a suit in Chancery proceed in the absence of any pleading on the part of the defendant? Is it in any and what cases essential to the interests of the defendant that he should file some pleading?

2. A patentee files a bill against one who, as the patentee alleges, has infringed upon the patent by selling articles differing only colourably from those which are the subject of the patent. The bill states that the defendant has made large profits by the sale, and the interrogatories seek an account of such profits. The defendant by answer denies the validity of the patent, and also that (if the patent were valid) the articles which he has sold would be in any way affected by the patent. Is the defendant bound to set forth the account required?

3. State generally when a bill of interpleader will lie. According to the general rule could a bill of interpleader be maintained by a sheriff against a creditor, claiming money received by the sheriff for the sale of goods under a writ of *fi. fa.* issued by virtue of a judgment obtained by the creditor, and against another person who claims the money, on the ground that he and not the debtor was the owner of the goods sold?

4. Is inadequacy of price to any and what extent a sufficient ground in equity for setting aside a contract of sale?

5. A., who is seised in fee of a freehold estate, conveys it, without any consideration, to B. in trust for C.; the trust for C. being duly declared by B. in a separate instrument. B. conveys the property for a valuable consideration to D., who has notice that the conveyance from A. was voluntary, but no notice of the trust in favour of C. Who is entitled to the estate?

6. In what Court or Courts can a suit be instituted for the payment of a legacy? If a pecuniary legacy is not charged on real estate, will it be paid out of the produce thereof in any and what circumstances?

7. A., in immediate expectation of death, delivers a watch to his servant, with directions to give it to B., and tell B. that he is to keep it in case A. dies. A. has previously made a will by which he bequeaths all his property to C. The watch is delivered to B., but A. has previously died. Who is entitled to it?

8. Explain the maxim, "*Qui prior est tempore, potior est jure.*"

By what other general rule is its application controlled, as regards real estate, in the Court of Chancery? And why has preponderance been given to the latter rule?

9. In what cases is time considered in Equity to be of the essence of a contract for sale? When not of the essence of the contract, in what manner should a party to the contract proceed if he wishes to put an end to undue delay?

10. A married woman claims her equity to a settlement out of a sum of stock standing in the names of trustees upon trust for her. State the leading provisions of the settlement which will be directed, and to what part of the stock it will extend in ordinary circumstances.

11. Upon what principle does the Court of Chancery grant relief against the enforcement of a penalty? A lessee covenants to ensure the demised premises against fire in the names of himself and the lessor: and the lease contains a proviso for re-entry on breach of the covenants. The lessee ensures in the name of the lessor alone. Can the lessee make a good title to the lease?

12. A, B, and C. enter into a joint bond as sureties for the payment of a debt due from D. to E. A. dies, and D. having made default, B. pays the debt. Has he a claim, and of what nature and to what amount, against C. and the personal representatives of A. respectively?

13. An estate is limited to the use of A. for life, without impeachment of waste, with remainder to the use of B. for life, with remainder to the use of C. and the heirs of his body, with remainder to the use of D. and his heirs. A. cuts down ornamental timber. Are B., C., and D. respectively entitled to any and what relief in Equity?

14. A father, previously to the marriage of his daughter, promises the intended husband to give the freehold estate of D. to the daughter. No conveyance is executed, but shortly after the marriage the father gives up possession of the estate to his son-in-law. The father and daughter die, each leaving a son. Who is entitled to the estate in Equity?

15. A, the owner of an estate in fee simple, conveys it in consideration of 1000*l.* to B. in fee. But the deed of conveyance contains a proviso that in case A. shall pay B. the sum of 1000*l.* at the expiration of twelve months from the date of the conveyance, then B. or his heirs shall re-convey the estate to A. B. takes possession and pays the expenses of the conveyance. He dies before the expiration of the twelve months. A. pays the 1000*l.* to B.'s heir on the day appointed, and the estate is re-conveyed to A. The 1000*l.* is claimed by B.'s executor. Is he entitled to receive it?

16. Upon the marriage of A. with B. it is agreed that a sum of money shall be laid out in the purchase of freehold lands, to be settled to the use of A. for his life, with remainder to the use of B. for her life, with remainder to the use of their first and other sons successively in tail. C., the eldest son of the marriage, is convicted of felony and sentenced to penal servitude. Whilst he is undergoing his sentence the survivor of his parents dies. The money has never been laid out. Does any forfeiture take place?

17. Jewels, befitting her station in life, are presented to a married woman by her husband, and others of a similar character by her father. The husband, having no jewels (except those above mentioned, so far as they can be considered his) at the time of making his will or of his death, bequeaths "all his jewels" to his daughter. Will either and which of the two sets of jewels pass by this bequest? Will either and which of them be subject to the debts of the husband, and, if so, in what circumstances?

18. A person not engaged in trade, and in solvent circumstances, by deed assigns a policy of insurance on his life to trustees upon trusts for the benefit of his wife and children, appoints the trustees his attorneys to receive the moneys payable on the policy, and delivers the policy and settlement to them. The trustees do not give notice of the assignment to the insurance office. Some years afterwards the settlor contracts debts to a large amount. Can one of the creditors who has recovered judgment against the settlor maintain a bill to have the settlement set aside?

NOTE.—When an opinion is required, the reasons on which it is grounded must be distinctly stated: it is not essential that authorities should be quoted, but they should not be omitted when remembered.

On the Common Law.

1. Illustrate this maxim, "that the law will rather suffer a private mischief than a public inconvenience."

2. Explain the following terms used in pleading:—New Assignment; Departure; Duplicity; Argumentativeness.

3. State shortly the nature of each of the following writs:—*Fieri facias*; *Capias ad satisfaciendum*; *Habere facias possessionem*.

4. What is the period of limitation in each of the under-mentioned actions:—Debt on Specialty; *Trover*; Trespass for Assault and Battery; Case for Slander?

5. Does liability attach to a public servant who, in obedience to orders from government, commits a trespass? Does the rule *Respondet superior* apply in this case? What mode of redress may sometimes be available against the Crown?

6. What things are absolutely privileged from distress at Common Law? What things are thus conditionally privileged?

7. State the four general rules laid down by Mr. Taylor as governing the production of evidence to a jury.

8. Distinguish between local and transitory actions. Put cases in which the venue is—(1) local—(2) transitory.

9. Define the offence of burglary and of housebreaking.

10. If on the trial of a person for the statutory offence of obtaining goods by false pretences, it be proved that he obtained the property in such manner as to amount in law to larceny, what verdict should be given? Mention tests for determining what is a false pretence within the statute.

11. Specify cases in which a nuisance may be abated by a private person.

12. How does the rule *Caveat emptor* apply as regards—(1) the quality of—(2) the title to goods?

13. What points were resolved in Blake's case, 6 Rep. 43, as to the mode of discharging a covenantor from liability on his covenant?

14. *Habemus optimum testem confitentem reum*. State fully the reasoning *pro* and *con* as to the correctness of this saying.

15. State the material facts in *Cornfoot v. Fowke*, 6 M. & W. 358, the decision there arrived at, and your own opinion upon the case.

16. Who is a common carrier? What degree of responsibility is imposed on him by our customary law?

17. What are the provisions of the 17th section of the Statute of Frauds respecting a contract for the sale of goods?

18. How does the rule *Ignorantia facti excusat* apply in criminal cases?

19. Explain the doctrine of merger by reference to Contracts of Record—Special and Simple.

20. What is the ordinary time allowed for pleading—(1) in bar—(2) in abatement?

21. What is a "consideration" for a promise? How do you understand the proposition, that "a past and executed consideration" will support such a promise only as the law will imply?

22. Explain the mode of getting execution on a bill of exchange in a summary way. By what statute is such mode of procedure made available?

Real Property Law.

1. Classify the principal kinds of Property under the two heads "Real Estate" and "Personal Estate." A Testator, by a will

dated since 1837, gives all his real estate to A. and all his personal estate to B. Will the Testator's leaseholds for years pass to A. or B.? Give the reasons and the authority for your answer.

2. A purchaser, on an unrestricted contract, buys land which turns out to be subject to tithe, land-tax and quit-rents. In respect of any, and, if any, which of these payments may the purchaser require compensation from the vendor?

3. Can you give any instances in which technical words are absolutely necessary either in a will or a deed?

4. A will contains a specific gift of things of a perishable nature (such as wine, provisions, stores, cattle, and so on) to A. for life, with a gift over on his death to B. absolutely. How is such a disposition construed, and what would be the result if the gift were residuary instead of specific?

5. Give a definition of dower applicable to the state of the law before the passing of the Dower Act of 1833. What changes were made by that act as to a woman's right to dower, and how may the dower of a woman married on or before the 1st of January, 1834, and the dower of a woman married since the 1st of January, 1834, be respectively barred?

6. Give the outline of a common conveyance of a fee-simple estate from A. and B. his wife entitled to dower, to C. a purchaser to dower uses—giving also the heads of the covenants for title. What superadded ceremony is necessary to the completion of the deed?

7. To what statute do estates-tail owe their origin? What are the only kinds of property which may strictly be the subjects of entails, and why and on what grounds was the restricted construction of the statute adopted? What is the result of an attempt to entail property not coming within the provisions of the same statute?

8. Fee simple estates are duly conveyed to and to the use of a trustee in fee, upon trust for A. B., a married woman, in fee for her separate use. What power of disposition has A. B. over the equitable fee?

9. A tenant for life in possession of estate A., and a tenant in tail in possession of estate B., both die after having respectively paid off mortgages existing on their respective estates before the dates of the settlements respectively. The mortgages are simply transferred to the tenant for life and tenant in tail respectively in the ordinary form. What is the presumption of law as to the merger or continued existence of each of the above mortgages?

10. From what person was the descent of an inheritance traced under the old law, and what alteration did the Inheritance Act

of 1833 make in this respect? In ascertaining the root of descent, has the burthen of proof been shifted, and if so, in what manner?

11. Explain the difference between an estate in coparcenary, an estate in joint tenancy, and an estate held in common. Show how and by what words these estates respectively arise or are created.

12. How and by whom may an estate in joint tenancy be severed? What is the effect upon the joint tenancy of the marriage of a woman entitled as one of several joint tenants to:—1. Freehold estates; 2. Personal estate in possession; 3. Personal estate in reversion?

13. What is the difference in the mode of their operation between—1. Common law powers and statutory powers not by way of use; and 2. Powers operating under the Statute of Uses? How would limitations of use, affecting the legal fee, contained in instruments exercising each of those classes of powers, take effect and be construed?

14. Where a lease purporting to have been made under a power is found not to comply with the terms of the power, will the Court of Chancery, independently of statutory enactments, interfere in favour of the lessee in any, and if any, what cases? And what is the effect of late Acts of Parliament in cases where leases are invalid, on account of deviations from the terms of the power?

15. In drawing a lease of land, in a case where the owners and incumbrancers are numerous, what is the best form of the operative or demising part, and of the reddendum?

16. Since the passing of the Act 8 & 9 Vict., c. 106, is a contingent remainder liable to failure or destruction by any, and if any, what means? Is it still necessary to adopt any, and if any, what plan to prevent such failure or destruction?

17. What is the difference between a springing and a shifting use? Give an example of each class.

18. What are the several rights generally of the lord and copyholder with respect to the timber and minerals upon and under copyhold property?

19. On the admittance of joint tenants of copyholds held of arbitrary manors, what fine is payable and how is the amount of the fine ascertained?

20. How were entails of copyholds (held of manors in which there was a custom to entail) barred before 1834, and how are entails in such copyholds now barred?

Jurisprudence and the Civil Law.

1. How ought the expression *Jus gentium* to be translated, and what relation did the system known by this name bear to the rest of the Roman Law? What is the Latin equivalent of "International Law?"

2. What is the true relation of the Law of Persons to the Law of Things? What was the nature of the mistake committed by Blackstone in speaking of the "Rights" of Persons and the "Rights" of Things?

3. At what period of Life, and under what circumstances, was a Roman citizen placed in the full exercise of his rights? What were the Disabilities which, under Roman Law, would prevent Usucapion and Prescription from running?

4. In what respects did the legal view of a marriage at Rome differ from that taken—(1) by the Canon Law—(2) by the English Law? What is the meaning of the maxim "*Consensus, non Concubitus, facit matrimonium*?"

5. What method of computing degrees of consanguinity is followed in Roman Law? Can a man, under Roman Law, contract a lawful marriage with—(1) his wife's sister—(2) his first cousin—or (3) his father's adopted daughter?

6. Explain carefully the nature of the *Tutela* and of the *Cura*. Which of them was the older institution? What is meant by saying that *Tutelage* is a Public Duty?

7. What is a *Usufruct*, and what are the rights and liabilities of the *Usufructuary*? Who is, in Roman Law, technically regarded as the Owner of Property in which a *Usufruct* has been created?

8. Explain the meaning and application of the maxims "*Sua Res potest servire nemini*," "*Servitutes perpetuam causam habere debent*," and "*Servitus servitutis esse non potest*."

9. Explain the terms "*Hæres*" and "*Hæreditas*." What relation does a Testament bear to a "*Hæreditas*?" Enumerate the principal consequences which flowed from the rule of Roman Law—"Nemo testatus et idem intestatus potest mori?"

10. Define a Substitution, and state the difference between the Pupillar and the Vulgar Substitution. Does a system of Substitutions bear any resemblance to an entail?

11. By what sort of succession does a Legatee succeed? What was the original distinction between a *Legatum* and a *Fidei-commissum*, and what were the chief changes effected in the Law of Legacies when Legacies and *Fidei-commissa* were assimilated?

12. Are the following good or bad legacies under Roman Law:

(1) to the person who shall come first to my funeral; (2) to that one among my Agnatic relations who shall first obtain the Consulship; (3) to Titius, in case he has not been convicted of a criminal offence by the period at which the legacy becomes payable; (4) an annuity to Seius to cease whenever he shall marry Caia?

13. Explain the phrases *Hæreditas delata*, *Hæreditas adita*, *Hæreditas acquisita*, and the expressions *Dies cedit*, *Dies venit*.

14. What were the policy and principal provisions of the *Lex Falcidia*, of the *Senatus-Consultum Pegasianum* and of the *Senatus-Consultum Trebellianum*? What changes did Justinian introduce into the law regulated by these Statutes?

15. What were Military Wills, and in what respects did they differ from ordinary Testaments?

16. Enumerate the Consensual Contracts, and state from what peculiarity they derive their name. In a common Contract of Sale, what liabilities does the Roman Law impose on the Vendor as soon as the Contract has been entered into?

17. What are the modes of discharging an obligation known respectively as *Solutio*, *Acceptilatio*, *Novatio*, and "*Consensus Contrarius*?"

18. Give the English equivalents of the Torts included in the Roman "*Injuria*." What is the difference between *Injuria* and *Damnum injuriæ datum*?

19. Explain the following definitions and rules:—

Litus publicum est catenus qua maxime fluctus exæstuat.

Idem juris est in lacu nisi is totus privatus est.

Potest reliquorum appellatio et universos significare.

Satisfactionis appellatione interdum etiam repromissio continetur, quâ contentus fuit is cui satisfactio debetur.

Jura sanguinis nullo jure civili dirimi possunt.

Non solet deterior conditio fieri eorum qui litem contestati sunt, quam si non; sed plerumque melior.

Quod contra rationem juris receptum est, non est producendum ad consequentia.

General Paper.

1. Trace the progress of the Constitution from John to Henry the Seventh.

2. Give an account of the Law of Libel, taking the word in its widest sense, down to the present time.

3. Contrast the Government of Charles the First with that of Charles the Second.

4. A. purchases an estate from B., and the conveyance is executed, but a part of the purchase-money remains unpaid. A.

dies, having devised the estate to C., and bequeathed the residue of his personal property, after giving certain legacies, to D. By whom shall the balance of the purchase-money be paid,—1st, supposing the residue sufficient to pay all the debts and the pecuniary legacies,—2ndly, supposing it sufficient to pay the debts only.

5. A testator gives his real estate to trustees upon trust to sell the same, and directs that the monies to arise from the sale shall be considered part of his personal estate. He gives these monies, together with the residue of his personal estate, to his friends A. and B. in equal shares. B. dies in the lifetime of the testator. To whom does the moiety which he would have taken, if living, belong?

6. A testator devises his freehold and leasehold estates to trustees, whom he also appoints executors. He directs that it shall be lawful for them to mortgage the freehold estate for the purpose of raising money in aid of the personalty, to be applied in payment of debts and legacies. The trustees execute a mortgage including both freeholds and leaseholds, with a power of sale. The mortgagee, after due notice and in pursuance of the power, sells the whole. Has the purchaser a good title to all or any of the property?

7. In an action for Libel what communication is deemed to be privileged? How may the defence of "privileged communication" be raised? Will an action lie against a man for refusing to give his servant a character?

8. A. offers a chain in pledge to B. (a pawnbroker), falsely and fraudulently stating that it is a silver chain, whereas in fact it is not silver. B. tests the chain, and, relying entirely on his own test and examination, advances money to A. upon the chain. Can A. be convicted upon this evidence of obtaining the money advanced by false pretences? Explain fully the grounds of your opinion.

9. Would a grant of goods which are not in existence, or which do not at the time belong to the grantor, operate to pass the property in the goods? State fully the law upon this subject, and cite cases in support of your opinion.

10. Prior to the year, 1834, what were the different modes of Conveyance of Freehold Estates at the Common Law and under the statute of Uses by instruments *inter vivos*? Which of those modes may still be adopted, and by what Statutes have the others been respectively abolished or rendered unnecessary?

11. A devise of the legal fee in land to A. for life, and after his death to the children of B., who shall attain twenty-one, as tenants in common in fee. Suppose that at A.'s death—1. B. has no child, but subsequently children are born :—2. B. has chil-

dren, but no child who has attained twenty-one:—3. B. has ten children, of whom at the death of A. four have attained twenty-one, and six are under that age:—what is the construction of the above limitation in each of the above three cases? Would you come to the same conclusion if the limitations were of the equitable fee in land, or if the limitations were trusts of personalty? Give the reasons and authorities for your answer.

12. By mistake a testator devises to A. the Dale Estate, which belongs to X., and by the same will the testator devises the Vale Estate (which really belongs to the testator) to X. What are the respective rights of A. and X. under the will?

13. What provisions of the Roman Law for preventing the disinherison of children did Justinian preserve?

14. What is the contract of *Pignus*? What in Justinian's time were the chief Rights and Duties of a Mortgagee, apart from special agreement?

15. What explanation can be given of the fact, that Theft was classed by the Romans among the Delicts? What was the test by which the Roman Law determined who was the person entitled to sue the Thief?

PAPERS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

1. PAPER ON A SCHEME FOR A LAW UNIVERSITY.

By J. N. HIGGINS, ESQ., BARRISTER-AT-LAW.

THERE may appear to be at first sight a contradiction in the terms which imply that a university may be restricted to one special branch of science, excluding the study of all others. The old notion of a university, and the strict one, no doubt, is, that its objects and concern extend so as to embrace the whole domain of human knowledge; that it includes all science and all literature. Accordingly, we find that in our great national universities there are professorships, not only of languages, mathematics, theology, and philosophy—natural, mental, moral, and social—in all their principal branches, but also of jurisprudence and of *belles lettres*. So great, however, has been the advance and increase in the extent and variety of learning since Lord Bacon mapped out his domain, and enunciated the principles to be adopted in its acquirement, that there is now hardly any great department of it, except that with which *we* are immediately concerned, which has not, more or less, asserted its independent claims and individual importance,

by the establishment of some corporate body, especially devoted to its study and culture. Thus, we have incorporated colleges or societies of physicians, surgeons, preceptors, engineers, chemists, actuaries, artists, and so on, none of them being devoted to the mere cultivation of an art or business, as distinguished from its cognate science, but dealing with science itself, and also with its application to the arts and business of life.

It is certainly strange that, in this respect, the course of English jurisprudence, as to the manner of and opportunity for its cultivation in this country, should have been for some centuries, until recently, entirely retrogressive.

In one of those quaint addresses to the reader which are to be found prefixed to Coke's Reports, that great lawyer, after minutely describing the functions of the inns of chancery and the inns of court, such as they discharged in Lord Coke's time, goes on to say, "all these are not far distant from one another, and altogether do make the most famous university for profession of law only, or of any one human science that is in the world, and advanceth itself above all others, *quantum inter viburna cupressus*. In which houses of court and chancery, the readings and other exercises of the law therein continually used, are most excellent and behoofful for attaining to the knowledge of these laws."¹ Lord Coke, in the essay from which I have just quoted, very fully describes the course and manner of study pursued by persons intended for the bar in his time, as well as what was required of utter-barristers. A student was first a moot-man, who argued readers' cases in an inn of chancery. After eight years study as a moot-man, he might become an utter-barrister, and have the chance himself of then being chosen as a reader in some inn of chancery. Out of the utter-barristers of twelve years' standing, were chosen benchers or ancients, from whom were selected what were called the single and double readers. In some respects, therefore—so far, at least, as regards organisation for the purposes of teaching, and a progressive course of study—Lord Coke was justified in speaking of the inns of court and inns of chancery in his day as a "most famous *university*," although it was for the study of the law *only*.

I am not now, however, about to enter upon a branch of our subject which has already, and particularly within the last twelve or fifteen years, been handled very largely. I therefore do not propose to occupy your time by any attempt at tracing the history or the reasons of the decline of legal education in this country. I remember to have read, I think, in Lord Campbell's Life of Lord Somers, that the noble biographer fixes that period as the commencement of the system of private pupillage in barristers' chambers; and points with regret to that fact, as the cause of the anomalous position of our inns of court and chancery in more recent times. Every body knows, however, that of late years, considerable attention has been directed to the subject now under consideration. I believe that one of the first symptoms of a desire on the part of the Inns of Court to revive their proper functions was an

¹ 3 Coke, xix.

attempt by the Middle Temple, some fifteen or twenty years ago, to appoint a lector to the ancient society of Clifford's Inn, which was said to have been, in old times, affiliated to the middle temple. The principal and rules of the former antique body, however, without seriously attempting to dispute the right of the middle temple, to make the appointment, adopted an effectual, though most hospitable mode of stopping his mouth, by invariably naming the dinner hour as the time for the learned prelection to come off; and I believe, upon every occasion on record, the learned reader and his venerable audience agreed unanimously that they might spend their hour in discussing something more palatable than law.

About the year 1845, the subject of legal education was seriously taken in hand by the inns of court; and in the year following, a scheme of lectorial instruction, and of voluntary examinations, was set on foot. Professors were appointed, and the experiment was commenced. Mr. Spence lectured to a large class at Lincoln's Inn on equity. Mr. Bowyer, at the Middle Temple, discoursed on civil law and general jurisprudence. At Gray's Inn, Mr. Lewis's lectures on the law of real property, attracted a crowd of students and junior barristers; and there were periodical moots and honour examinations, which were entirely successful, and did much to prepare the way for what has since been accomplished. We know that there is now a council of legal education of all the Inns of Court, and that no student is eligible to be called to the bar, who has not either attended one whole year the lectures of two of the readers, or satisfactorily passed a public examination. The examination lasts for part of three days, and is both oral and by printed questions. Studentships have also been founded, and there are certificates of honour, the holders of which take rank in seniority over all other students called on the same day. Five readers (all of them accomplished lawyers) have been appointed — one on constitutional law and legal history, one on equity, one on the law of real property, one on jurisprudence and the civil law, and one on common law. The method of education combines public lectures, with instruction by the lecturers in private classes; and I believe that the income of each lecturer depends, to some extent, upon the degree of his success. If I am not mistaken, the lecturers are also the public examiners. I do not stop now to make any remark upon the peculiar features of this scheme. I am merely stating facts, and endeavouring to discover, as matter of fact, what is the present condition of legal education in this country. It was generally rumoured a year ago, that there was a great difference of opinion among those who constitute the governing bodies of the inns of court, as to the subject of a compulsory examination previous to admission to the bar. The names of distinguished lawyers were freely mentioned as advocates of the *status quo*; and persons of no less eminence in the profession, were named as the favourers of the test of a compulsory examination. It is said, that owing to a very small majority, things remain as they are. It is worthy of note, however, as I have already mentioned, that, according to the regulations now in

force, no one (except he passes a public examination) can be called to the bar, unless he shall have attended one whole year, at the least, the lectures of two of the readers.

Before 1835, any person by mere service under articles, and without an examination, might become an attorney. The body of solicitors established the incorporated law society, and instituted an examination, which must be passed by every student previous to admission on the roll of attorneys. Since then, they have also established lectureships in common law, equity, and conveyancing; and since then, owing to the untiring exertions of the council of the incorporated law society, the educational requirements of persons who are desirous to become attorneys have been greatly raised. A bill, moreover, is now before Parliament, providing, amongst other things for the establishment of a preliminary examination for such students.

In addition to the opportunities offered by the inns of court and the incorporated law society, for legal education, there are others which it would be unfair to overlook. Cambridge has its Downing Professor of the civil law and Regius Professor of the civil law. In Oxford there are the Vinerian Professor of common law, the Chichele Professor of international law, and the Regius Professor of civil law. The University of London has its examination in law, and the principles of legislation, and there is also the Gresham law lectureship. From what has been already stated, it will be seen that something has been done within the last few years; and that there are now at work numerous educational agencies, touching the science of jurisprudence and the legal profession. I desire not to depreciate them, but on the contrary to give to all of them the honour they deserve. But the facts which I have stated are sufficient to raise several questions of an important character, in reference to the particular topic now under consideration.

1st. Is there any reason why all these valuable agencies should remain disconnected, without any general plan or harmonious action?

2ndly. Is the sum total of what is, or can be, accomplished by them all, sufficient for the requirements of the country, or even of the legal profession?

I shall consider the second question first. What then are the requirements of the country and of the profession in respect of legal education? Upon a casual glance they might appear to be limited to the supply, first, of a learned judiciary; secondly, of a learned and well-trained body of advocates; and thirdly, of a respectable and educated body of gentlemen for the discharge of the more detailed and minute duties connected with the administration of the law. If this assumption were correct, I should hardly have felt justified in addressing the society upon the present subject; but the assumption, in fact, is very incorrect. Although the legal profession, using the term in its narrowest sense, may be said to include only the three classes of persons which I have enumerated, yet it would be a mistake to assume that, putting them aside, the country has no further necessity for the services of a considerable number of persons who have had

the advantage of a systematic legal education. I would allude, first and foremost, to the great body of our unpaid magistracy. England, I believe, is the only country in Europe, in which the law is to any considerable extent administered by persons who never received any education in the law. I am far from denying that the rude equity generally administered by country justices is not generally fair enough in its results. Perhaps that it is so, we are more indebted to a free and watchful press, and to the very general feeling of respect for law on the one hand, and for private rights on the other, which exist in this country, than to the fact that the magistrates are almost universally ignorant of the law which they are called upon to administer. A recent elaborate and valuable work, devoted to the duties of a justice of the peace out of sessions,* I have no doubt has already had the effect of raising an alarm in the breasts of many of those worthy gentlemen, as it ought amongst the entire community. The vast number of things of a disagreeable and dangerous character, which a justice of the peace out of sessions has a right to attempt, is truly startling. The Acts of Parliament intended specially to relate to his jurisdiction, or to guide or interfere with it, are well nigh greater than any man could number; while the law of evidence to which he is supposed to pay respect, is the same as that which sometimes taxes the ingenuity of the subtlest minds, and of the most learned lawyers. In a very clever article on the subject of justice and justices, in the February number of the *Law Magazine*, I find the following observations:—"It is alleged that the catalogue of offences extends to two thousand, on which magistrates have power to impose fines and terms of imprisonment, from the smallest sums up to £100, and from the shortest periods up to twelve calendar months; at quarter sessions, they have power to imprison for much longer periods, or to sentence to penal servitude for a period corresponding to transportation for fourteen years. Writers on criminal law assert that there are five hundred offences indictable and triable, which must previously be investigated by magistrates at petty sessions. In addition to all this, there are numerous matters relating to wages, apprentices, highways, railways, turnpike-roads, church-rates, the poor-law, and all its complicated rules, granting licences, cases of affiliation, appointing constables, overseers, hearing appeals against rates, &c. In fact, the administration of the law in *every-day affairs*, is altogether intrusted to magistrates. In reference to law, as its operation affects the masses of the people, *justice law* is infinitely more important than Westminster Hall law. The great body of the people pass year after year without hearing one word about the superior courts at Westminster; but they are on all sides surrounded by magistrates' courts, in which are transacted the daily work of popular legal affairs. What, then, are the requisite qualifications for the proper discharge of these complicated and weighty duties? Before a magistrate is permitted to inflict his views of the multitude of intricate statutes, which partly form justice law, upon his fellow-countrymen, what proof

* "Summary of the Duties of Justice of the Peace out of Sessions." By Thomas J. Arnold, Esq., one of the Metropolitan Magistrates.

has he to give that he has ever read them, or, if he have, that he understands the scope and intention of the legislature? Ere the justice is invested with the appalling power to fine heavily his neighbours, or to incarcerate them for long periods, by what previous examination has he proved that he is qualified mentally, legally, and morally for the performance of such terrible duties, so vitally affecting the liberties, wealth, and happiness of Englishmen? To all these inquiries, the only answer is, none whatever."

Of late years, however, there has been, no doubt, a very strong leaning on the part of the executive, and of the country generally, in favour of the appointment of stipendiary magistrates; and in the metropolis, and most of the great provincial towns, professional gentlemen of experience in the administration of criminal law have been appointed to the office. I am not aware whether practising barristers have been or are now *always* appointed, and whether they only can be appointed, to the office of paid magistrate in this country; but by a return just issued to an order of the House of Commons, it appears that out of seventy-two stipendiary magistrates in *Ireland*, only four were barristers. The qualifications of the others are stated in detail in this official document. Thus, the qualification of one gentleman was, that he was "an Exon in the Royal Guard of Yeomen of the Guard;" of another, that he was a "clerk in the commander of the forces' office;" of another, that he "held a company in the militia," and so on. I offer no explanation of this anomalous state of things; nor do I desire to raise any discussion upon the question whether men educated in the legal profession, and those only, ought to be eligible for such appointments. I wish to avoid every extraneous topic, and to adhere to the logic of facts. Independently, therefore, of the question last mentioned, and of the more general question involved in the system of unpaid magistracy, it remains to be considered whether it would not be desirable—whether it is not, in fact, loudly demanded by the requirements of the country—that there should be some means of imparting a suitable legal education to that large class of administrators of the law which are comprised in the magistracy, stipendiary and unpaid. I submit that nothing less than a legal university will accomplish this.

In former years, perhaps—certainly in old times—more than at present, the inns of court were frequented by a considerable number of country gentlemen who desired to become justices of the peace in their own localities. The majority of them, probably, obtained the degree of barrister-at-law in due time; and although few of them during their pupillage learned much of the law in direct or dogmatic manner, they were, upon the whole, improved as to their legal knowledge, by habitually mixing with real students of law. Now, I do not mean to suggest that there should be any sudden, or at however distant a date, any inflexible rule that the commission of the peace should not be conferred upon any except those who had received some degree or certificate of a legal university. But I think that it would be most useful, not only to the class of persons from

whom the unpaid magistracy and members of Parliament are ordinarily selected, but to the community at large, if part of the education of such persons was conducted within the precincts of a legal university, and with a view to their future magisterial or Parliamentary duties ; and I think I shall be able to show that this suggestion could be much more easily, and would more probably be, carried into effect, by means of a legal university, such as I shall hereafter describe, than by means of any existing institution.

I now turn to another class of persons outside the profession of the law, for whose instruction in, at least, one branch of jurisprudence, it is certainly high time to make some provision. Standing armies and foreign embassies owe their commencement to the same date in the history of modern civilization. What at first, however, appeared to be an accidental circumstance, seems now to have the character of a natural and necessary association. Jeremy Bentham, if I mistake not, invented the word "international ;" but what we mean by questions of public international law—questions savouring of juristical science, and arising between one nation and another—have long engaged the attention of jurisconsults. Of late years, however—owing to the greatly increased facilities of inter-communication between states lying widely apart, and to the vastly increased number of interests and transactions between the subjects of different states—questions of public international law have been assuming startling importance, not less because of the frequency with which they arise, than of the results which they sometimes involve. Yet, strange to say, the almost universal rule in this country is to appoint as foreign ambassadors, persons who, not only are unacquainted with such subjects, but, from their previous pursuits, must be assumed to be hardly competent to consider, much less to decide, them. Thus, we have found on several occasions that this country has been committed to war, or very nearly so, in reference to questions appertaining purely to international law, while the agents who have had English interests under their care were manifestly wholly incapable of dealing with such subjects. I shall allude to one or two recent instances, and merely by way of illustration.

In the month of March last, a conversation took place in the House of Lords, as to the duty of English naval officers whose ships were stationed in the bay of Naples, in reference to Neapolitans claiming protection, upon the ground that they were exposed to personal danger. It is sufficiently evident, from what transpired in that conversation, that a very important abstract question which was involved had never received the consideration which it deserved ; and that it was left to be decided at haphazard by our ambassador, or whatever admiral happened to be in command of the station. Again, there is some reason to doubt whether we should now be exposed to the cost and vexation of a war with China, if Mr. Bruce had been accustomed to consider such questions of abstract right, as, for example, whether the denial of one country to the ambassador of another, of his right to

"choose the most expeditious and commodious route to the capital," * is by the law of nations sufficient ground of itself, not only for the declaration of war, but for the commencement of hostilities ; or the question of an ambassador's right or authority, not only to declare, but to make war ; or the question, how far, and in what cases an ambassador has power over the commanders of his country's naval and military forces, and the extent to which ambassadors can order or control warlike operations ? I may also allude to one more illustration, which is furnished by what was called the American difficulty of four years ago. Our ambassador at Washington then was Mr. (now Sir John) Crampton, a gentleman, I believe, who pretends to no more acquaintance with the principles of jurisprudence than ordinarily belongs to our diplomatic agents. There is little reason to doubt that, if Mr. Crampton had been accustomed to consider questions of a legal character, this country would have been spared the risk of a war with the United States, and the humiliation of an apology, that although our minister had violated the law of the United States, it was from ignorance or want of consideration, and not from deliberate intention.

I say that ambassadors, and persons discharging diplomatic functions, ought to be familiar, not only with the principles of the law of nature and nations, but with the principles relating to those international duties and obligations which arise from specific conventions or treaties ; that such familiarity can be secured only by well-directed study of those branches of international law ; that means for such study ought to be provided ; and that such means might best be provided through a law university.

Nobody, perhaps, will be found who will deny that, in the discharge of diplomatic functions, questions of a juristical character, which can only be dealt with by persons imbued with knowledge of legal principles, frequently arise ; and the practice in this country has been to refer such questions for solution, where it is possible to do so, to the law advisers of the crown. In a passage from the state papers of Lord Burleigh, cited in Dr. Phillimore's *Commentaries upon International Law*, we are informed that the English Government of that day propounded a number of questions to civilians for their opinion, and no doubt some such course is usually, when it can be, adopted nowadays. And so not less it would, and ought to be, if English diplomatists, as a rule, received an education in the principles of international law. Whenever any grave and important question of international law, which affected the interests or the honour of this country, can be referred to the consideration of our ablest lawyers at home, of course it ought to be ; but as in ordinary matters (such as are affected only by municipal law), it frequently requires a tolerable lawyer to under-

* Since the foregoing was written, some correspondence has been laid before Parliament (*Times*, 28th May), including a letter from the Foreign Office in 1849, stating Lord Palmerston's views on the subject of the right of British ships of war in a foreign port to receive on board and shelter the subjects of a foreign government. It also includes one from Mr. Elliot to Lord John Russell, dated in March last. Whoever will read the correspondence cannot fail to be convinced of the importance of having such questions discussed on principle by persons conversant with the doctrines of international law.

stand and appreciate the questions which arise, simply as *questions*, without reference to their decision, which, perhaps, would only be within the competency of far abler men, so, in international affairs, it sometimes requires the education of a lawyer to understand and appreciate the significance and possible results of certain acts or proceedings which properly come within the cognizance of jurists.

There is also another reason why it is extremely desirable that our diplomatic agents should be conversant with legal principles and questions; and the reason is one which is daily acquiring greater force. I refer to some legal questions of international interest connected with commerce, such as the different interpretation of the liability of shipowners in respect of collisions at sea, in different civilized states; the use of fraudulent trade-marks in foreign countries (as to which I may refer to a very important communication on the subject which appeared in the *Times* of last week); the extradition of criminals; the law relating to foreign debtors; the administration of bankrupts' estates, and the adjustment of the liabilities of firms where the business is carried on in different countries; questions relating to the doctrine of neutral flags, and the still unsettled category of what is contraband of war. All these are surely subjects demanding something like a legal education in him who has to deal with them definitively. Nor is the Government or Parliament unwilling to recognize the force of such arguments as these. I find by the third report of her Majesty's Civil Service Commissioners, that international law is now one of the subjects in which candidates for the office of paid *attaché* are examined. I see in the report, twelve questions on that subject which have been proposed to such candidates; but as far as I have been able to discover, there is but one examiner in law for the entire civil service of England, although I find the several great branches of the law form distinct subjects of examination, namely, real and personal property law, mercantile law, equity, common law, conveyancing, constitutional law, and international law. Moreover, it nowhere appears where or in what manner our future diplomatists are expected to gain a knowledge of international law, so as to prepare themselves for examination. There are already, possibly, some gentlemen who have acquired a facility in cramming such candidates so as to enable them to pass; but I have great doubt whether, in the absence of any school suitable for students in international law, such examinations will much conduce to the education of our foreign diplomatists in this respect.

We now come to another class of persons in whose legal education the country is interested. I mean our consuls abroad. Although they are not public ministers, yet they have an important character and position; and they discharge important public functions of a quasi-judicial nature. They have at least the *jurisdiction arbitrale* over such of our countrymen as happen to be within their district; and they have in most instances, indirectly—by means of their local influence in the state to which they are accredited—and perhaps, in the degree in which its customs and religion are antagonistic to our

own—considerable power in all matters in dispute between subjects of the Sovereign for which they act, especially in all matters relating to commerce.* The British Consul is the natural protector of the British sailor in a foreign port. Under the Merchant Shipping Act, the consul forms part of a naval court to try certain important cases as to the discipline of ships. The consuls of Turkey and the Levant have both criminal and civil jurisdiction. There is an appeal from the out ports to the judge at Constantinople, from whom there is an appeal to the privy council. Mr. Chancellor Kent has treated largely on the duties and jurisdiction of American consuls and vice-consuls. The authorities and powers of our consuls are regulated in part by Acts of Parliament, in part by general instructions from the foreign office, in part by orders in council, in part by municipal law, and in part by international law and the comity of nations.† There are also certain acts, orders in council, and circulars conferring jurisdiction upon, or directing the manner of, its exercise in particular consulates; as for instance in the Levant and Turkey, Siam, and also in China.‡ There would not be time for one to give the faintest idea of the extent and variety of the judicial or quasi-judicial duties of English consuls abroad in different parts of the world. Such duties are very onerous and very numerous, and certainly require for their satisfactory discharge some knowledge of criminal and of constitutional law, as well as of the laws affecting the shipping and commerce of this country.

By way of illustration of the curious prejudices which are superinduced in the minds of officials in favour of the *status quo*, I may allude to Mr. Hammond's evidence before the committee on Consular Service, 1857—58, p. 193, Question 2266 :—

Does not the very fact of your appointing a barrister to act as judge and vice-consul, rather show that a knowledge of law would be a very great benefit to our consuls generally?—Only in the Levant; and I should say that so much of the civil law there depends upon the custom of the Levant, that a legal education is not required for a consul even there, and might perhaps be rather a disadvantage than otherwise.

The French have no necessity to change the plan, inasmuch as they have in the *chancelier*, a man who is a legal adviser?—Yes, a man of legal education.

Does he decide cases between French subjects?—I imagine he acts rather as assessor and adviser.

This appointment at Constantinople does not interfere with the other consuls in the interior of Turkey in any way, does it?—They are subject to the jurisdiction of the judge; they are to obey the orders, and report to the judge what they do, &c., &c.

At present the civil service commissioners—at the suggestion no doubt of the Foreign Office—affect to require of candidates for the consular service, “a sufficient knowledge of British mercantile and commercial law, to enable them to deal with questions arising between British shipowners, shipmasters, and seamen.” I believe, however, that the same examiner—a gentleman certainly of great learning and varied accomplishments as a lawyer—who examines candidates for the situation of “third class clerk” in the solicitor's

* See “Phillimore's Commentaries,” vol. i. pp. 42, 43.

† See “British Consul's Manual,” by E. W. A. Tuson; 2 “Phillimore's Commentaries,” part 7.

‡ See Tuson *passim*, p. 122—176.

office of one of the public departments, in the principles of equity, and in such questions of common law as the special indorsement of writs, has also the task of testing the knowledge of consular candidates in questions relating to bottomry bonds, seamen's allotment tickets, the effect of blockade, and how far the slave trade is to be regarded as piracy. Supposing consular candidates not to be members of any inn of court, or students at the Law Institution, it is not easy to imagine how they could become at all conversant with commercial law, so as to be able to answer such questions at all satisfactorily, if the answers are intended to be some test of their competency as mercantile lawyers. Ought there not to be some test of their knowledge other than a dozen questions put by an examiner, whom we cannot suppose himself to be very familiar with this subject? If it is desirable, then, that our consuls should be persons of such an education as I have indicated, is it not clear enough that, in their case, as also in the case of our ambassadors, there ought to be some means by which such an education might be imparted?

Another class of persons in this country requiring legal education, is also to be found amongst other departments of our civil servants. Thus, I find that clerks of the House of Lords, in case they are ignorant of, or afraid to pass an examination in, English History, must prove to the satisfaction of some one (it does not appear whom), that they have the power of drawing up legal instruments or clauses in a bill; a power which it may be remarked in passing, does not always appear to belong to the noble lords themselves. So in the colonial office, the elements of constitutional and international law, are one of the subjects of examination for a clerkship. Committee clerks of the House of Commons have to pass an examination in the elements of the law of evidence. For a situation in the metropolitan police court, a candidate must (if he be a certificated attorney, but strange to say, it appears not otherwise) pass an examination in criminal law. Something is expected from a clerk in the solicitors' office, either in the inland revenue, the post office, or the treasury, more than could be found in some judges at Westminster Hall, or than ever will be found until that millennium shall arrive, when common law and equity shall cease their bickerings, and Westminster Hall and Lincoln's Inn embrace in token of eternal amity. The course of subjects for these clerks embraces the widest domains of law, it takes in the general principles both of equity and common law, and to all appearance the whole of conveyancing, including, of course, its minute details. The same remarks apply here as in the former cases to which I have referred, and I shall therefore not repeat them.

India, and our wide colonial empire (even excluding Canada and Australia, as for this purpose we may), present a very wide field for observation, in reference to the subject now more immediately under consideration. Want of time, however, prevents me doing any thing more than asking your attention for a moment, to the necessity of providing for the special education of men who desire to qualify themselves for judicial or magisterial employment in our colonies.

At present, English lawyers (to whom as a rule we can hardly attribute more than a knowledge of our own law) administer judicially, without any previous special training, very different systems of law in our various colonies. In British Guiana, the Cape of Good Hope, Natal, and also in Ceylon, they administer Roman Dutch law. In the Mauritius, I believe the code civil is of more authority than Blackstone or Viner. In Trinidad, the laws are Spanish in their origin. In St. Lucia, the laws come from the *Coutume* of Paris. Some of these systems are now in force by virtue of special treaty; for instance, upon the surrender of Demerara and Berbice, the articles of capitulation expressly stipulated that the laws and usages of these colonies should remain in force. We interpret the agreement by sending out judges familiar only with English law, to administer what is known as the Roman Dutch law, a species of compound, as its name imports, between the Roman civil law, and the colonial edicts and ordinances which emanated from the supreme authority in Holland.*

Throughout the vast continent of British India, many ancient and elaborate systems of law are administered by Englishmen who never had the advantage of *any kind* of legal education, and have no acquaintance with the principles even of their own law. In India, in addition to the laws enacted by the Governor-General, there is the Hindoo law, emanating from very various sources, interpreted by different schools of native lawyers, and written in a great number of Hindoo law-books. Then there is the Mahometan law, of which I may say the same thing; and there are the laws peculiar to the Parsees, Portuguese, Armenians, and the other nations of India. The Indian law commissioners of 1853, recommended that the anomaly of the administration of law, and of such law, by men who were not lawyers, should be put an end to, and that, in future, barristers of five years' standing should alone be eligible for such appointments; but, although that might be some improvement on the present system, would not the necessity of providing suitable education for such barristers still remain?

I shall allude only in the most cursory manner, to the importance of providing for the legal education of the class of men from whom our lawgivers come; and on this subject I may be permitted to read to you a passage in an address, delivered in 1850 to this society, on the formation of a law school, by its noble president.

Alluding to the mischiefs which arise from the want of a legal education in the general body of our legislators, Lord Brougham says:—

“The one which first strikes us is, that all questions, not merely of a purely legal description, but which are in any way connected with matter of law, are left in the hands of professional lawyers. The

* The case of *Steele v. Thompson*, 8 W. Rep. 374, is a recent instance in point. It was an Appeal to the Privy Council from the Supreme Court of British Guiana; and the question was whether, according to the Roman Dutch law, a conveyance or “transport” could pass a servitude or easement by implication. On the hearing of the appeal, numerous authorities relating to the Dutch and the Civil law, but none relating to English law, were cited.

rest of the assembly recoil from the consideration of them ; it is forbidden ground to be avoided by all ; it appertains to the sanctuary, not within the veil of the temple, but as near adjoining, *par cause de vicinage*, it is not to be looked at, much less profanely trodden by lay feet. Yet, many of the most important general questions have such legal relations ; and these are, therefore, turned over to the lawyers, as within their exclusive province, which they manifestly are not. But then, it may be said, on such questions it is better that professional men be consulted—consulted, certainly ; as certainly not obeyed—and for this plain reason, that you never can be sure of having professional men who ought to govern the decision. Nay, you never can tell what force of this description there is in the assembly. The lords, indeed, have always amongst them high legal functionaries ; yet even they are of uncertain number and value. Thus, it is a mere accident that any lawyer but the Chancellor is a member of the upper house ; and no one can pretend that all questions connected with legal subjects should be left in his hands. The lower house has often hardly any lawyer fit to dictate upon such subjects. But lawyers do not always, perhaps do not often, take the most enlarged or enlightened view upon subjects of legislation. They have the bias of the craft ; they are averse to change ; they view things with a professional eye—an eye jaundiced with the prejudices of their calling. They worship the *Idola specus* much—the *Idolon fori*, different from that so named by Bacon, most devoutly and most constantly of all. To make them safe guides, even in matters of law, they must be consulted by him who is so far acquainted with his subject as to be on his guard against the consequences of such idolatry. But for want of this knowledge being generally diffused, the lawyers oftentimes mislead their fellow law-makers.”

As I have already said, I have very much abstained from a discussion of any such questions as relate to the special education of barristers and attorneys ; and I now desire to say a word upon the subject, not as it interests the profession so much as it does the public generally. Perhaps, in a law university, better equity draftsmen, special pleaders, or real property lawyers, would not be turned out, than are now to be found in the ranks of the profession. But I think, as a rule, better *lawyers* might be—lawyers who would be more capable of serving society, not only in discharge of their proper professional functions, but in all that relates to the amendment of the law and its administration. So long as it is the rule that every student, at the very commencement of his career, devotes himself to the study of some particular department of English jurisprudence, so long, in the nature of things, must the present arbitrary and unscientific divisions of English law remain impregnable and ineffaceable. The only hope of ever bringing about in any satisfactory manner that fusion of law and equity, about which the present Attorney-General has written and spoken so much, and which the present Lord Chancellor has endeavoured to effect by a vigorous and sweeping, but I think ineffective bill, which is now before parliament, is by means of the common education of

English lawyers in the general principles of jurisprudence—which are common to, and underlie, both law and equity—by means, I say, of an education, in fact, adapted to the particular end of accomplishing such a fusion, as well as the initiation of a more scientific jurisprudence than we have yet known in this country.

I believe that in most other countries all law students, or at least those intended for the judicial office, or the practice of advocacy, must necessarily go, up to a certain point, through the same education, not only in polite literature, but in the great principles of all the various branches of the science of law. In France, a student must first obtain the diploma of *bachelier des lettres*, before he presents himself at the *Ecole du Droit*; and every student must, before he becomes an *avocat*, prove his familiarity with, not only the *Code Napoléon*, but with criminal, commercial, and international law.¹ Throughout Germany, where some functionaries, such as notaries public, are included in the ranks of the profession, every student of law must qualify at some gymnasium or high school, and pass a final examination in general law (encyclopædia of law), and also in the common law of Germany, the Roman law, and other subjects. In the kingdom of the Two Sicilies, “any one intended for the profession of the law, after passing his examination in *belles lettres*, must undergo a course of examinations in one of the universities,” in civil, and criminal, and commercial law, and also in the common law and *Jus Naturæ et gentium*. In the United States of America, no person is allowed to practise in the law until he has passed an examination which differs in different states. Even in the province of Upper Canada, where students for both branches of the profession appear to be educated together, there are entrance and final examinations for all the students, such examinations being adapted to the different classes of students, and taking into account whether they have been to a university or not; but all of them embracing both common law and equity.

I believe this is the only country in the world where a man is permitted to, and may even with advantage to himself, practise one branch of law, being in total ignorance of every other. That anomaly and opprobrium would, at all events, be wiped away by the establishment of a law university, which would prescribe a common course of study for all its students during a certain and sufficient period of their pupilage.

I find that I have expended so much time in discussing the second general head of my subject, that I am compelled to make short work of the first general head, which I reserved for subsequent consideration. We have been considering how far the general requirements of the country and of the profession (but especially of the former), in respect of legal education, are met by the present means of legal education in England. We had already formed some estimate of what those means are. We have seen that they are altogether inadequate to the necessities of the country. I think that they are more inadequate than they need be, or would be, taking into account the wealth of some of the

See *Inns of Court Inquiry Commissioners' Report*, p. 10.

bodies to which I have referred, and also the intellectual vigour and resources of this country, if these bodies, as far as possible, were brought into united or harmonious action ; and if the plain duty were set before them, not merely of the training up every year of an indefinite number of advocates and attorneys, but of completely providing for the legal education required by the entire country ; for the legal education of those whose duties, though not of a professional nature, nevertheless demand some knowledge of the general principles of law, and also, perhaps, of some one or more of its special branches.

I think it has been clearly shown, that it is hopeless in this country to cultivate legal studies to any considerable extent at our existing national universities. I think I have also shown that all the agencies for legal education now at work, are insufficient to meet the requirements of the country. The question remains, whether any mere extension of such agencies would meet the case—or whether it might be more effectually met by a combination or re-organization of them all, or of so many of them as may be united ? I respectfully submit for the consideration of this Society, that the latter is the only feasible and judicious course to adopt. The inns of court are, and have always been, institutions designed for members of and students for the bar only. They never have been, and never conveniently can become, schools or colleges for the instruction of the several classes of persons to whom I have referred, or of our colonial judges or Indian writers. Neither could the Incorporated Society affect to discharge such a duty. The Universities of Oxford and Cambridge have professors of law, as they have professors of music, of physic or archæology, merely for the sake of theoretical completeness—to carry out the old notion of the universality which should characterise such institutions. But Oxford and Cambridge never have been, and never can be, efficient to discharge such duties. All the different classes of extra-professional persons, as well as the colonial functionaries to which I have referred, are, in some sense or other, public servants, and their education is more or less the concern of the state. Now, I mean to say that a law university might be constituted which would provide for the legal education, not only of such persons, but also of barristers and attorneys ; and that the education of them altogether in the same university, would be attended with the best results to all. I propose, then, shortly, that the four inns of court and the Incorporated Law Society should be constituted a law university for the purposes already mentioned. That there should be a matriculation common to all students ; and that for a given period, according to the analogy of both English and foreign universities, the course of study should be the same for all. At the end of such period, I would suggest that either the same university or the inns of court, retaining their present special functions, should undertake the special education, and the duty of selection of candidates for the bar. In the same way, after such period of study common to all the students of the university, let the university or the Incorporated Society discharge the special functions now assigned to the latter body. Let the University itself have within its particular province the various

extra professional classes of persons, and also the peculiar subjects to which I have referred. A student intending to become a barrister, might enter the university and some inn of court at the same time ; and so articulated clerks to attorneys might enter the university and the incorporated law society together. The Inns of Court and Law Institution would thus still retain their privileges, and each would continue to have its *specialité*. The only difference would be, that no one could become a barrister or attorney who had not matriculated at the university and passed a subsequent examination there.

I shall now, very shortly, by way of conclusion, state the advantages which I think would arise from such an institution.

1st. It would be extremely useful that every person intended for the practice or the administration of the law, should, before entering upon the study of the special branch for which he was intended, devote a sufficient time to the study of the general principles, which are common to every department of jurisprudence.

2nd. One of the most immediate beneficial results would be the breaking down of the present arbitrary and artificial distinctions of English law, which have been maintained hitherto mainly by reason of the fact, that in no one generation of lawyers, are there an appreciable number of persons who are completely conversant with the doctrines of equity on the one hand, and the rules of law on the other.

3rd. It would greatly tend to facilitate the process and improve the manner—what Jeremy Bentham called the mechanics—of legislation, by informing the minds of the class from which our legislators come, in the principles of legislation and jurisprudence.

4th. It would improve the quality, in all respects where a knowledge of law was requisite or desirable, of our diplomatists, consular agents, rural magistracy, and a considerable body of civil servants.

5th. It would tend to elevate the social position, and the professional qualifications of attorneys.

I shall only add, that the scheme which I have proposed has more or less sanction from that which has been adopted in almost every civilized state except our own.¹

I have been so pressed for time in the preparation of this paper, and have had to travel over so much ground, that I have been unable to make much use of what has already been done by others in the same field ; and have confined my observations to such matters as appear to me not to have been hitherto much adverted to. I have already alluded to Lord Brougham's inaugural address, delivered before this Society, on the formation of a law school. Mr. Macqueen, in a lecture before the Benchers of Lincoln's Inn, in 1851 ; Mr. W. D. Lewis, in a paper read before the Juridical Society ; Mr. Cookson, in a paper read before the Metropolitan and Provincial Law Association in 1855, have published numberless valuable suggestions upon the subject. I have been mainly anxious to avoid what has been already so well done.

¹ Inns of Court Inquiry Commissioners' Rep., pp. 10 & 11.

2. REPORT OF THE SPECIAL COMMITTEE ON THE LAWS OF LUNACY.

IN the year 1848 a reference was made to the Committee on Equity of this Society, "to consider the state of the law respecting the confinement of persons alleged to be lunatics."

The Committee made a Report, in which they commenced by stating that there were three classes of lunatics who were more or less the subject of legislation in this country :—1st, Pauper lunatics ; 2nd, Persons found lunatic under a commission from the Court of Chancery ; and 3d, Persons not so found lunatic, but who were placed under the restraint of a lunatic asylum.

The Report then states, that the first and second of those classes the Committee did not intend to consider on that occasion, but directed attention to the third class only.

The Report then sets out the law as then existing respecting this class of lunatics, and more especially the Act of 8 and 9 Vict., cap. 100, passed in 1845, and the practical working of the law, by which various abuses were evidently capable of being, and were in fact, perpetrated.

The Report then makes various suggestions for amending the laws respecting lunatics, amongst which are the following, which still remain unnoticed by the subsequent amendments of the lunacy laws in the year 1853.

The Report recommended, amongst other suggestions—

1. That before the liberty of a person is taken away on the ground of his being a lunatic, there should be a further inquiry by some person having a judicial character, within a reasonable period after the first confinement in an asylum.

2. That after the lunacy had been properly established, the property of lunatics of all kinds should vest in an official committee, to be administered for their benefit by the Masters in Lunacy, or by some local jurisdiction in the provinces.

3. With respect to private lunatic asylums, the Report contains the following passage :—"A question has arisen whether the whole class of private lunatic asylums should not be abolished, and public asylums substituted, which should be subject to the direct control of the Government. Your Committee are not prepared at present to recommend that this should be done, although it deserves consideration." The Committee, however, made the following suggestions as to private asylums—That increased inspection, more frequent official visits, and greater strictness in granting licences and certificates for confinement of patients should be required ; and they also recommended that it would be an advantage to have public asylums where private patients would be received, and where the lunatic would receive treatment which would leave no suspicion as to the operation of interested motives.

4. The Report then strongly recommended that provision should be

made for the regular visitation of asylums by the clergy, and it concluded with the following suggestion—

5. That the persons employed by the keepers of asylums to effect the caption of lunatics, should be placed on a register to be kept by the Commissioners in Lunacy, who should receive complaints as to their misconduct, and have the power of dismissal. That the original order and certificates (and not copies only) should be deposited in the office of the Commissioners in Lunacy, and not be given to the custody of the keepers of the asylums. That in case of sudden death a coroner's inquest should be held, and that no licence of an asylum should be granted except to a duly educated medical man, and that some further regulation should be made as to enforcing the residence of proprietors of private lunatic asylums.

Of all these recommendations the only one adopted by the Act of 1853, which was intended to amend the Act of 1845, was that relating to the deaths of patients in lunatic asylums, and even now the coroner is only authorized, not absolutely required, to hold inquests on persons dying in asylums, in case he should entertain doubts as to the "cause of death;" but it must be observed that the "cause of death" has to be certified to the coroner by the *proprietor* of the asylum, and it cannot be expected that such proprietor would criminate himself or his attendants in cases of ill-treatment.

In all the above suggestions, so far as they extend, the present Committee entirely concur, and have also to offer the following further suggestions for amending the laws of lunacy:—

1. No person ought to be confined as a lunatic unless upon the certificates of two duly qualified medical men, one of such certificates also to be verified on oath, and the order of admission countersigned by a magistrate, after due investigation into the necessity of such confinement.

2. Copies of the order and certificates ought to be furnished to the patient if required by him, or to such person as he may direct to be furnished with the same on his behalf.

3. Greater facilities should be afforded to persons detained as lunatic patients to have the necessity of their confinement determined by a jury.

4. Private asylums ought to be visited at least once a-month by properly constituted authorities, and single patients once every two months.

5. The visits of friends of patients ought to be encouraged, and the correspondence of patients with the visiting authorities or with their friends ought to be free from control, under proper regulations.

6. All Chancery lunatics ought to be visited the same as other lunatic patients, and by the same authorities.

7. The practice of the office of the Masters in Lunacy ought to be assimilated to that of the chief clerks in Chancery.

8. An official committee ought to be united with the ordinary committees of person and estate, and in small estates might act alone, to save the great expense of appointing committees.

9. All pauper patients who require restraint ought to be placed in public asylums, and not retained in workhouses.

10. The Boards of Commissioners in Lunacy, Masters in Lunacy, and Visitors in Lunacy, and the office of Registrar in Lunacy, ought to be amalgamated into one general Board of Lunacy, and which should have the entire supervision of all lunatics and their property; and the present staff of the Commissioners in Lunacy ought to be increased by the appointment of Assistant Commissioners, to undertake the increased duties of more frequent visitation of all lunatics, both in the metropolitan and provincial districts.

Many further amendments have been suggested by your Committee; but as they chiefly relate to details as to the regulations to which private asylums ought to be subjected, and to the treatment of private and single patients, your Committee think that such *minutiae* may be properly left in the hands of the Commissioners in Lunacy, especially if they were invested with more extensive powers for those purposes, subject to appeal to the Lord Chancellor or other legal tribunal.

THE COMMISSIONERS' REPORT ON EVIDENCE IN CHANCERY.

THIS very valuable Report merits careful perusal, and we need not apologize for printing it here to our readers.

We, the undersigned of your Majesty's Commissioners appointed to inquire into the mode of taking evidence in Chancery, and its effects, humbly certify to your Majesty that by the Act, passed in the 15th and 16th years of your Majesty's reign, for amending the practice and course of proceeding in the High Court of Chancery, various extensive changes were made in the mode of taking evidence in that court.

After the system then introduced had been for a short time in operation, complaints were made that it occasioned great expense and delay; and in the year 1854, Lord Cranworth, then Lord Chancellor, called the attention of the late Commissioners for inquiring into the Practice and Procedure of the High Court of Chancery to the subject; and they, in the month of August in that year, submitted to him a memorandum, in which, after stating that the general impression in the profession appeared to be that the unquestionable advantages derived from an oral examination of witnesses before the examiner were obtained at too great a cost of time and money, and that the Commissioners were disposed to concur in that view of the case, they recommended various changes in the existing system, adding, however, that the proposals then made must be considered as tentative merely, it being their opinion that by experiment alone could the most eligible system be determined.

Pursuant to that memorandum, a general order of the Court was made on the 13th of January, 1855, the object of which was to carry into effect the recommendations of the Commissioners.

The Commissioners, by their third report, dated the 14th of April, 1856, after referring to the memorandum of August, 1854, and the general order of the 13th of January, 1855, which, they stated, had, as they believed to some considerable extent, removed the evils complained of, proceed to say :—" We have, however, to add on this subject that it is one of great difficulty, and that in our opinion further experience is required before it can be determined, with any certainty, what is the best system of taking evidence in a Court of Chancery."

The system introduced by the Act of Parliament, to which we have referred, modified by the subsequent general order, has been ever since in operation.

Under this system every party in a cause is now at liberty to verify his case, wholly or partially by affidavit, or wholly or partially by oral examination of witnesses, taken before one of the examiners of the Court, or before an examiner specially appointed for the purpose ; and where any evidence is adduced on affidavit, the opposite party is entitled to compel the attendance of the deponent who has made the affidavit, in order to his being cross-examined orally before the examiner, the expense of that attendance being paid in the first instance by the party requiring it, and being part of his costs in the cause.

In addition to the evidence thus adduced, the Court, if it sees fit, may, at the hearing of the cause, require the production before itself of any party or witness in order to his being examined *viva voce* as to any points on which fuller information may be desired.

In order to satisfy ourselves as to how far this system is open to objection, and if so, then how it may best be amended, we, in the first instance, caused letters to be addressed by our secretary to the various gentlemen who had given evidence upon this part of the subject before the late Commissioners, requesting them to inform us what was the result of their experience of the alterations made in pursuance of the suggestions of the Commissioners.

The majority of these gentlemen gave us their written opinion on the subject, which we have annexed in the Schedule A. to this our report.

We also caused to be made known to the legal profession in London our desire to receive written opinions on the subject from gentlemen who had not been examined before the former commission ; and we have appended in Schedule B., annexed to this report, the opinions which we received in consequence of this intimation.

We considered it, moreover, desirable to ascertain the opinions of solicitors practising in the country ; and with that view our secretary addressed letters to members of the profession in different parts of England, requesting them to collect and forward to him the opinions of solicitors in their respective neighbourhoods ; and we append in Schedule C. the answers we received to those letters.

Several of the Commissioners, from time to time, made written com-

munications to us, expressing their views on the question we had to consider, all of which we have set out in Schedule D. annexed to our report.

The inquiries which we have thus made have satisfied us that the present system is open to grave objections.

The course of proceeding before the examiner has led to unnecessary delay and expense; and, though these evils might probably be materially diminished by new regulations, enabling the examiner to compel unwilling parties to proceed with greater expedition, yet we do not think that any such changes would go to the root of the evil. In a large part of the cases brought for decision before the Court of Chancery, there are no facts, or very few facts, in dispute; though it must still be necessary, as a security against error, that the Court should have all facts on which its judgment is to rest established by proof before any decision is come to in the case. For this purpose evidence taken on affidavit seems to be the most desirable, as being in general more expeditious, and less costly, than evidence obtained in any other form. As a security for its being trustworthy, proper facilities must be afforded to those affected by it, enabling them to cross-examine the deponents by whom the affidavits are made.

With respect to material facts which are disputed, we have come to the conclusion that the only reasonable course is, that the evidence bearing on them should be adduced *ore tenus* before the Court which is to decide on the whole case. We are persuaded that any attempt to remodel or improve the course of proceeding before the examiners would prove illusory. The evil arising from having the evidence taken before one functionary, and its weight and effect decided on by another, is an evil of principle and not of detail.

We have, therefore, come to the conclusion, that the system of taking evidence before the examiners should, except in some special cases, wholly cease, and that all evidence should be adduced either on affidavit or *vidé voce* at the hearing.

In order to explain more fully our opinions on the subject of our inquiry, and the mode in which we consider that the existing evils ought to be dealt with, we have agreed on the following resolutions, which we venture respectfully to submit to your Majesty:—

1. That the present mode of taking evidence in the Court of Chancery is unsatisfactory, and in some respects requires alteration.

2. That it is desirable that facilities should be afforded for the trial of material facts contested between the parties upon *vidé voce* evidence, to be given before the judge who is to decide upon them, or before a jury.

3. That after issue joined in a cause, or in such stage of any proceeding pending in the Court as shall by general order be fixed in that behalf, any party within such time as by general order shall be fixed in that behalf, shall be at liberty, by notice in writing, signed by him or his solicitor, and served on the opposite party or his solicitor, to require that the evidence as to facts or issues specified in such notice shall be taken *vidé voce*.

4. That, except as to matters included in such notice, each party may support his case by evidence in chief, adduced on affidavit or otherwise, according to the present practice, subject to the provisions hereinafter contained.

5. That when a party has filed an affidavit in support of his case, any opposing party may, within such time and in such manner as by general order shall be fixed in that behalf, give notice that he requires the production, for cross-examination at the hearing, of the deponent who has made the affidavit; and, unless such deponent be then produced, the affidavit shall not be read unless by special leave of the Court.

6. That any party in a cause may compel the attendance at the hearing of any person whom he may desire to produce as a witness, in the same way as such attendance may now be compelled at trials at *Nisi Prius*.

7. That at the hearing of the cause the *viva voce* examination and cross-examination of witnesses shall be had in the presence of the judge as to the matters included in any such notice as aforesaid, and affidavits shall only be received of such facts and documents as the judge shall consider not to be included in the terms of the notice.

8. That, except as hereinafter mentioned, all examinations taken by the examiners of the Court or by any special examiner, shall be taken *ex parte*, and no person shall have a right to be present at the taking of any examination except the party producing the witness, his counsel, solicitor, and agents; and that every examination so taken shall be deemed to be an affidavit; and it shall be the duty of the party who has obtained such examination to file the same, which shall thereafter be dealt with in all respects as an affidavit.

9. That the Court at the hearing, or at any rehearing, may require any witness who has made an affidavit, or has been examined to attend, to be orally examined; and may also direct the trial before the Court, either with or without a jury, or at *Nisi Prius*, of any issue of fact not proved to the satisfaction of the Court by the existing evidence.

10. That in case of a rehearing or appeal, the judge's notes shall *prima facie* be taken to be a sufficient note of the *viva voce* evidence; but the Court before which such rehearing or appeal is had, may supply any defect in the judge's notes by the notes of counsel or otherwise, as it may deem just.

11. That on any rehearing the Court may, if it thinks fit, give leave to any party to adduce further evidence *viva voce*.

12. That where both parties shall agree in desiring that a trial should be had before the Court with the assistance of a jury, or before a judge at *Nisi Prius*, and shall agree on the issues to be tried, they shall be at liberty to apply to the Court to order such trial to be so had accordingly, and the Court shall make such order thereon as it shall see fit.

13. That, unless by consent of all parties interested, no examination shall be had before any examiner or special examiner otherwise than as mentioned in the 8th resolution, save only that, by leave of the Court, any person may, in respect of age, infirmity, or other sufficient cause,

to be approved by the Court, be examined or cross-examined according to the present practice.

14. That in the case of examinations or cross-examinations under the last preceding resolution, it shall be the duty of the examiner of the Court to attend, upon an order of the Court being obtained for that purpose, at any place in England or Wales, for the examination and cross-examination of such witness, and the reasonable expenses of the examiner in that behalf incurred shall be paid to him by the party requiring the examination, and shall be costs in the cause unless otherwise directed.

15. That wherever notice requiring *viva voce* examination shall have been given by any party under the third resolution, the Court shall determine at the hearing, whether, in the circumstances of the case, it was reasonable and proper to give such notice, and shall dispose of the costs occasioned by such notice as it may think just; and if the Court shall be of opinion that such notice was given unreasonably, or for the purposes of delay, oppression, or vexation, it may order costs as between solicitor and client to be paid by the offending party in respect of all expenses occasioned by such notice.

16. That these resolutions shall apply not only to the hearing of causes, but also to the motions for a decree; and it shall be lawful for the Lord Chancellor, by general order from time to time, to direct that the same may be applied to any other proceeding, subject to such modifications as may be necessary.

17. That in all causes and matters in which any infant, married woman, *non compos*, or person under any other disability, is a party, the consent or admission of the next friend, guardian, or other person acting for the party under disability, shall, if given with the sanction of the Court, or a judge in chambers, have the same force and effect as if given by a person not under disability; provided always, that no such consent of any committee of a lunatic shall be valid, as between himself and the lunatic, without the sanction of the Lord Chancellor or the Lords Justices sitting in lunacy.

18. That none of the foregoing resolutions shall apply to evidence taken in suits to perpetuate testimony.

We regret to add, that one of our members does not concur in our general resolutions, and has himself made a separate report.

All which we humbly submit to your Majesty.

CAMPBELL, C.
LYNDHURST.
BROUGHAM.
CRANWORTH.
WENSLEYDALE.
CHELMSFORD.
KINGSDOWN.
JOHN ROMILLY, M.R.

J. L. KNIGHT BRUCE, L.J.
G. J. TURNER, L.J.
W. P. WOOD, V.C.
RICHARD BETHELL.
H. M. CAIRNS.
GEORGE MARKHAM GIFFARD.
W. STRICKLAND COOKSON.
GEO. TALLENTIRE GIBSON.

SEPARATE REPORT BY LORD ST. LEONARDS.

I, one of your Majesty's Commissioners appointed to inquire into the mode of taking evidence in Chancery and its effects, humbly certify to your Majesty that in the Act, passed in the 15th and 16th years of your Majesty's reign, referred to in the Report of your Majesty's other Commissioners, special directions are contained for the examination of witnesses orally before one of the examiners of the Court, where the evidence is not taken by affidavit, in the presence of the parties, their counsel, solicitors, or agents; and the witnesses so examined are to be subject to cross-examination and re-examination, and a witness who has sworn an affidavit is made subject to oral cross-examination before the examiner. The Court has power to require the production and oral examination before itself of any witness or party in the cause; but at present it rests wholly in the discretion of the judge whether there shall be any examination in open court; neither party can insist upon it. Your Majesty's late Commissioners for inquiring into the practice and procedure of the High Court of Chancery, in their memorandum referred to by the Report now before your Majesty, stated that the general impression was, that the unquestionable advantages derived from an oral examination of the witnesses before the examiner, were obtained under the present system at too great a cost of time and money, and in this view they were disposed to concur. For the reasons which they state, they would object to the evidence being taken in open court, and they proposed certain alterations with a view to save time and money, but still altogether retaining the examination before the examiners, and their recommendations were carried into effect by general orders, which authorized either party to proceed by affidavit. This rule diminished in a very material degree examinations in chief, and increased in a still greater degree cross-examinations, and the time of the examiners is now principally occupied in taking cross-examinations upon affidavits.

I agree with your Majesty's other Commissioners, that the course of proceedings before the examiners has led to unnecessary delay and expense; but I regret to say that I cannot concur in submitting to your Majesty the resolutions upon which they have agreed. By their 8th resolution all examinations taken by the examiners are to be taken *ex parte*, and no person is to have a right to be present at the examination except the party producing the witness, his counsel, solicitor, and agents, and every examination so taken is to be deemed to be an affidavit, and is to be dealt with as such. The 13th resolution provides that, unless by consent of all parties, no examination shall be had before any examiner except as mentioned in the 8th resolution, save only that by leave of the Court any person may, in respect of age, infirmity, or other sufficient cause to be approved by the Court, be examined or cross-examined according to the present practice. These resolutions would, if carried into effect, operate to a large extent as a repeal of the statute of 1852. Of course, no one would avail himself of the

power reserved to him by the 8th resolution, of being present at the examination *ex parte* by the examiner with his witness, counsel, solicitors, and agents, for the examination would operate only as an affidavit which could be made without any resort to the examiner.

The 3rd resolution of the Report is, that any party shall be at liberty to give notice to his opponent that he requires the evidence as to facts or issues, specified in such notice, to be taken *vivâ voce*, and the abuse of this privilege is, by the 15th resolution, proposed to be prevented by the power to inflict costs. The 5th resolution gives power to an opposing party to give notice that he requires the production for cross-examination at the hearing of the deponent who has made an affidavit; and the 7th resolution provides, that at the hearing of the cause the *vivâ voce* examination and cross-examination of witnesses shall be had in the presence of the judge as to the matters included in any such notice.

If these resolutions should be adopted by the Legislature, they would apparently render the offices of the examiners all but a sinecure, and practically impose their important duties on the Court itself. The threat of costs will not prevent parties from insisting upon the examinations being taken orally before the Court; and where one party commences by an affidavit the other would have a right to cross-examine before the Court, so that a hearing with *vivâ voce* evidence in open court could always be obtained without having recourse to the right provided by the 3rd resolution, which might expose the party to costs under the 15th resolution. The numerous cross-examinations which now take place before the examiner, would not only be transferred to the judge in open court, but would be increased, as examinations before the examiner would only operate as affidavits.

The constant demand on a judge in equity to decide upon points of law, and to consider the bearings of the evidence, requires quiet and calm in the Court itself. The course of the law should not be interrupted by addresses to a jury, the introduction of common law counsel, and all the wrangling of trials at *Nisi Prius*. Courts of law are enabled to avoid the interruptions which would arise in courts of equity, were they compelled to summon juries or constantly to hear *vivâ voce* evidence. The equity judges have not only to transact in court all the important legal business which comes before them, but to follow it into chambers, and see that the decree of the court is properly carried out, a duty which until 1852 was not imposed upon them. If, as proposed, there should now be added the constant hearing in court of *vivâ voce* evidence, and sometimes with juries, and necessarily the taking notes of the evidence for their own use, and to be used on appeals and rehearings, it may be found that more duties are imposed on those judges than any man can fairly be required to perform. Under the existing law, evidence may be by affidavit or by written depositions, or *vivâ voce* before the Court, with or without a jury, with full powers of cross-examination. But these powers are properly, as it seems to me, under the control and direction of the Court.

The principal objections to the present system before the examiners are delay and expense. But it has not yet had a fair trial, and it has been abused by the suitor. There is very great delay, and yet the examiners have half their time unemployed. This arises, first, from a faulty mode of procedure. Every case has a day appointed for it, and consequently it is only at the end of a long list that any new suitor can obtain an appointment. Suitors themselves are answerable for the second cause of delay; they are constantly in the habit of neglecting to keep their appointments, and frequently abandon their privilege.

In 1858, out of 255 appointments taken out before the examiners, 118 were unattended; 137 only were therefore attended out of 255; and every one of these unattended appointments stopped the whole course of business.

It appears to me, therefore, that the law of 1852 has not yet been fairly tried, and that we should consider not what substitute we can find for it, but how we can work it to advantage, and, as far as may be expedient, improve it. In this view I would beg to suggest as follows:—

1. That the examiners should be put in possession shortly of the points to be proved. The desire to get rid of the old method of pleading has led to uncertainty of what are the issues to be tried. It would hardly be an improvement to adopt the Scotch plan, and thus introduce a still more burdensome scheme of paper warfare.

2. That in case of any abuse—*e. g.*, the cases mentioned by the examiners in their evidence, of 17 days evidence and of cross-examination of one witness $4\frac{1}{2}$ days—the examiner should communicate with the judge, who should, if he deem it expedient, order the examination before himself.

3. That every case should be heard successively and continuously. No appointment to be made except for short matters, or for long cases by arrangement with both parties.

4. At ten o'clock every morning short cases to be taken, according to a previous list.

At eleven o'clock the cases in their order to be taken according to a previous list of the day, and to be disposed of as in Court. Absence of counsel or of witnesses to be dealt with as if the case were before the Court.

If the Court were to hear the evidence *viva voce*, of course the same strictness would prevail as upon a trial at law. There is no reason why the same strictness should not prevail before the examiner.

5. The lists to be made out so as to prevent unnecessary expense and delay. How to accomplish this would soon be ascertained from communications with the solicitors.

If the order of 1857 were rescinded, the cross-examination on affidavits would be reduced in number.

No party or parties in the same interest should attend by more than one counsel before the examiner.

A strict control should be kept over the costs of cross-examination on affidavits.

It would perhaps save expense if examinations in chief were to be made upon interrogatories, as under the old practice.

Both parties should be at liberty to apply for an issue, subject to proper regulations.

I may refer to the opinions of your Majesty's Commissioners for inquiring into the Practice and Procedure of the High Court of Chancery, in support of the views which I have taken of this subject.

All which I humbly submit to your Majesty.

ST. LEONARDS.

Notices of New Books.

[*.* It should be understood that the notices of new works forwarded to us for review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance seem to require it.]

Lord Brougham's Law Reforms, containing the Acts and Bills introduced or carried by him through the Legislature, since 1811; with an Analytical Review of them; by Sir John E. Eardley-Wilmot, Bart. London: Longman & Co., 1860.

WHEN the larger volume of "Lord Brougham's Acts and Bills" appeared, we had the pleasure of reviewing it at considerable length. It was a good idea of the learned editor to collect them, but the book naturally ran to a large size. The legislative labours of such a man as Lord Brougham during half a century, when given in detail and at length, cannot be comprised in a small compass. But this is an age when people want to have "handy-books" of what interests them, and Sir John Eardley-Wilmot has done well to prepare, in this smaller volume, an account which is sufficiently ample for many purposes, and will be far more accessible than was the former edition. We would not, however, have it supposed that we agree with all the editor's comments and dissertations, but they are always readable; and the little volume of "Lord Brougham's Law Reforms" is really amusing, as well as instructive as to the circumstances which belong to the legislature of the last half century.

Wrongs and their Remedies, being a Treatise on the Law of Torts; by C. G. Addison, Esq., &c., author of the Law of Contracts. 1 vol. 8vo. London: V. and R. Stevens & Sons, 1860.

IN our February Number we gave some notice of Mr. Hilliard's work in two volumes, published last year, on the "Law of Torts or Private Wrongs;" we have now to ask attention to a still later publication on the same subject—the absence of a full treatise on which has so long been a *lacuna* in legal literature. The author states his object to be, "to present to the reader an accurate view of the present state of the law on the subjects treated of, without burthening his mind with technical legal learning which is now obsolete, or perplexing his judgment with contradictory and conflicting decisions;" and he hopes "that the task has been faithfully and carefully accomplished." The work consists of twenty-one chapters, into which appear to be

distributed all the departments of the law of torts, together with treatises on actions *ex delicto* generally, parties, misjoinder, &c., pleadings and evidence therein, and damages and costs recoverable in such actions, respectively. An ample table of cases, filling in double columns sixty-four pages, and an index of matters, which, however, is less copious than might have been wished, make part of the volume. In our next Number we purpose to place before our readers the means of appreciating for themselves the degree of utility which belongs to Mr. Addison's performance of the heavy task which he has undertaken.

A History of Education for the English Bar, with Suggestions as to Subjects and Methods of Study; by Philip Anstie Smith, M.A., Barrister-at-Law. London: Butterworths, 1860.

THIS work is one of great interest in the present day. It evidently emanates from the pen of a thoughtful man, who deserves to have a hearing accorded to him. But, like the last-named volume, it arrived too late for further notice now. We defer reviewing it till November.

The Medical Knowledge of Shakespeare; by John Charles Bucknill, M.D. London: Longman & Co., 1860.

DR. BUCKNILL's book would not have been prepared but for a bad habit, common among men and women, and others of the animal creation—that of following bad examples. Lord Campbell's foolish little book on Shakespeare's *legal* acquirements, has excited others to try and illustrate the poet's other special qualities and attainments. Dr. Bucknill has here done it at large, and proportionally provokes us. Hath not the reader—a *fortiori* hath not a reviewer, who, alas! is not a volunteer, but carries his weapons on rigorous conditions—we say, hath not a reader hands, organs, dimensions, senses, affections, passions? If you prick us (which is frequently the case) do not we bleed? If you tickle us—alas! how rarely you try—do not we laugh? If you poison us—as you slowly but surely are doing—do we not die? and if you wrong us (and we feel Dr. Bucknill and all those Shakespearean critics have, for months past, been endeavouring to wrong us most cruelly)—*shall we not revenge?* This last question we are disposed, so far as Dr. Bucknill is concerned, to answer in the affirmative. When, already sick of these books, you, Dr. Bucknill, come forward—

“When I was sick, you gave me bitter pills,
And I must minister the like to you.”

Still we will not—

“Creep into the jaundice
By being peevish;”

but admit that, if such a book ought to be published at all, Dr. Bucknill might as well undertake the office of manufacturing it as any other man. It exhibits considerable learning, and if more might

have been displayed, as is highly probable, we are very glad, for the sake of all parties, that it has not been attempted. The book, however, may possibly please others better than it does us. Now that the author has

"Cleansed his stuffed bosom of that perilous stuff
Which weighs upon our hearts,"

let us pray that there be no more on't.

Let the Chancellor stick to the woolsack as long as he can (as doubtless he will do), or, if need be, let him compile more and more of his spurious biographies. But, in the name of all the gods at once, let him and all others henceforth leave "Shakespeare's acquirements" alone, or we shall be having some one publishing soon, "A Handy-Book of Shakespeare's Acquirements."

These books, taken in conjunction with the "Collier Forgeries," and the petty quarrels and heart-burnings of rival editors, induce us to join earnestly with the sentiment of him who wrote on the fly-leaf of his copy of Shakespeare—

"Bless'd be the men who rightly con him,
And cursed be they who comment on him."

The General Statutes of the Commonwealth of Massachusetts; revised by Commissioners appointed under a resolve of February 16, 1855, to which the Constitution of the United States and the Commonwealth of Massachusetts are prefixed, and a List of Acts previously repealed. A Glossary and Index are added. Edited by W. A. Richardson and G. P. Sanger.

In the autumn of last year we received from the learned commissioners appointed to revise the general statutes of the commonwealth of Massachusetts their report. This report has, it would seem, substantially been transmuted into a law under the "General Statutes," and came into operation in June last. These statutes, with an index and other matter added for popular use and convenience, have now made their appearance in one large and handsome volume—but too late for us to do more than acknowledge its receipt. The mode in which this revision has been undertaken and carried out, requires a full examination at our hands—especially as here, in the "old country," we have been in vain hankering after doing the like with regard to our own laws.

NEW EDITIONS OF LEGAL PUBLICATIONS.

1. The Law of Contracts; by John William Smith, Esq., late of the Inner Temple, Barrister-at-Law. Third Edition; by John George Malcolm, Esq., of the Inner Temple, Barrister-at-Law. London: V. and R. Stevens & Sons, 1860.

2. *Commentaries on the Law of Bills of Exchange, Foreign and Inland, as Administered in England and America, with occasional Illustrations from the Commercial Law of the nations of Continental Europe*; by Joseph Story, LL.D., one of the Justices of the Supreme Court of the United States. Fourth Edition, revised, corrected, and enlarged. Boston: Little, Brown, & Co., 1860.
3. *Principles of the Law of Scotland*; by George Joseph Bell, Professor of the Law of Scotland in the University of Edinburgh. Fifth Edition; by Patrick Shaw, Advocate. Edinburgh: T. & T. Clark, 1860.
4. *A Treatise on the American Law of Landlord and Tenant, embracing the Statutory Provisions and Judicial Decisions of the several United States in reference thereto, with a Selection of Precedents.* Third Edition; by John N. Taylor, Counsellor-at-Law. Boston: Little, Brown, & Co., 1860.
5. *A Treatise on the Medical Jurisprudence of Insanity*; by J. Ray, M.D. Fourth Edition, with additions. Boston: Little, Brown, & Co., 1860.
6. *The Statutes, General Orders, and Regulations relating to the Practice and Jurisdiction of the Court of Chancery, with copious Notes, containing a Summary of every reported Decision thereon, up to Easter Term, 1860*; by George Osborne Morgan, M.A., of Lincoln's Inn, Barrister-at-Law. Second Edition, greatly enlarged. London: Wildy & Sons, 1860.
7. *A Practical Treatise on the Law of Marriage, Divorce, and Legitimacy, as administered in the Divorce Court, and in the House of Lords.* Second Edition, greatly enlarged. By John Fraser Macqueen, Esq., Barrister-at-Law. London: Maxwell, 1860.

We have classed the above works together, on the ground of their having repeatedly reached new editions. Several of them have been reviewed in our pages on previous occasions.

1. Of Mr. Malcolm's edition of Smith on Contracts, we need say little, for it is both known and appreciated in the profession. We may sum up our judgment in one sentence.—It is an excellent work, admirably edited.
2. Amongst the numerous books on the Law of *Bills of Exchange*, that by Mr. Justice Story has high claims for consideration. We

are by no means indiscriminate admirers of this learned author ; but this volume has been, and will still be, found very valuable to the practical lawyer.

3. There is no reasonable expectation, and we may say no rational hope, that the *Laws of Scotland* and of England will be amalgamated for generations to come ; but the English practitioner can hardly afford to remain in total ignorance of the jurisprudence of the northern division of Great Britain. If he do not contain within himself much information thereon, it is just as well, in fact all the more needful, to possess a book which does. There must necessarily be close analogies between most of the principles and provisions of the laws of contemporaneous civilized countries, though their technicalities and nomenclature differ both in origin and character ; hence the English or Scotch lawyer, by the aid of a work in the nature of Mr. Bell's *Principles of the Law of Scotland*, may glean enough for particular purposes. The author of the work before us, George Joseph Bell, was the brother of one of the greatest of our scientific men—Sir Charles Bell—of whom it is related that, going one day into the lecture-room at Paris of the leading anatomist of the day, the lecturer paused in his Address, then turning again to his class, dismissed them. "Gentlemen," said he, "you now see the great M. Bell ; it is enough for one day !" So we would say to our ordinary English readers, "Here you have before you Mr. Bell's (G. J.) book, fifth edition. It is enough for your lifetime." To the Scotch lawyer the value of the work is of a very different and more important character.
4. Mr. Taylor's Treatise on Landlord and Tenant addresses itself more particularly to the American lawyers. The statutory provisions, and judicial decisions—even in those of the United States, "where legal science has been most cultivated and improved," are of course frequently not applicable in England. "The English treatises," says Mr. Taylor, "fail to exhibit a correct view of this branch of the law as modified by republican institutions, and reformed by the commercial spirit of the age ;" and though Mr. Taylor's work labours under similar defects, so far as the English practitioner, who prizes a work for daily reference only, is concerned, nevertheless, to one who may be seeking for arguments, illustrations, and light, under new conjunction of circumstances, Mr. Taylor's "Landlord and Tenant" will be found an acceptable addition to the library.
5. Dr. Ray's Treatise we reserve for the occasion, which we must ere-long take, to resume the consideration of the important but difficult subject of the medical jurisprudence of Insanity.
6. Mr. Morgan's second edition on the practice of the Court of Chancery, is in fact a new work. It is well arranged and indexed, and accurately edited. It contains the consolidated general orders of the

court. As the author observes, the consolidation, though executed with care, "has been felt to be practically incomplete for want of a digest of the numerous decisions on their construction, which have become as much a part of the practice as the orders themselves." As the light of nature will not of itself sufficiently illuminate the reader of the authorized edition of the orders, the learned author of the work before us has thrown the lustre of all the decided cases upon each rule as it occurs.

7. Mr. Macqueen's second edition of the "Practical Treatise" is also, like the last-named work, both in form and substance almost a new—and, we will dare to say it, altogether an improved book. It will probably come under our notice very shortly; for legislative efforts must be ere long resumed on the subject of divorce. With Mr. Macqueen's statement of the law as it is, we are content; that we should agree with him as to its proper amendment, we much doubt. Can it be true, as we read in Mr. Macqueen's preface, p. ix., that the man who of all others ought to be consulted on the working of the present bill, and whose advice ought at least to be listened to attentively—can it be possible that Sir C. Cresswell has not been called on by the government to give information as to the reforms and modifications desirable in the procedure which he so ably regulates and employs? The learned judge, six months since, in *Lloyd v. Lloyd*, is reported to have said, "*when he was called on by competent authority for his opinions as to what would be desirable amendments on the present system, he should be prepared to offer suggestions, but until so called on, he should leave it to the wisdom [sic] of the legislature to devise improvements.*" Rashness is a dangerous fault; cobbling an unsightly and unsatisfactory process; but a congregation of rash cobblers could not be more dangerous and mischievous than a legislature which is too vain to take competent advice, and yet meddlesome, and ambitious to set every thing to rights.
-

Events of the Quarter.

PARLIAMENTARY.—The most important event which we have to record is that which relates to the House of Lords throwing out the Bill for the Abolition of the Paper Duties. That this proceeding has opened up a most important constitutional question there can be no doubt; and we should deal with it in a manner commensurate with its theoretical importance, if we did not feel that, in point of fact, it will have no practical and permanent influence on the relations between the branches of the legislature. The technical procedure necessary to pass the Bill in question, gave the Lords the opportunity of exercising the unconstitutional power of rejecting it. They seized this opportunity, and the act is not resented by the House of Commons, nor punished by the public, only because it happens that it is a general opinion that we want the million and a quarter of money, which the continuance of the paper duties will produce. Hence, although some tall talk is indulged in, yet the profitable wrong of the House of Peers is connived at. The people of England know that they have the power in their hands to prevent the repetition of this assumption of power, if it should again be attempted to be asserted to the supposed detriment of the commonwealth. We sometimes see in courts of justice a technical or tricky step permitted when taken in favour of Equity, which if attempted by the other side would be condemned and punished. We do not express our approval of this course of conduct, in which principle is neglected to be asserted, because it seems at the time convenient in a pecuniary sense; but we offer as our excuse for not entering into the subject very fully, that in our judgment the abnormal exercise of veto by the Lords on this occasion will bear no injurious fruits, nor be cited as an authority hereafter. Even Lord Monteagle would not be so unwise, nor would Lord Derby be so rash, as to provoke public feeling by thus interfering again if they took the unpopular side of the question. In point of fact, however, Mr. Gladstone had not a majority in the Commons; for nine votes in favour of the Government is tantamount to its being in a minority.

Mr. Toulmin Smith, in his *Parliamentary Remembrancer*, is the authority which has dealt most completely on this subject. His great constitutional knowledge, antiquarian learning, and thorough zeal for ancient rights, entitle him to an attentive hearing; and the committee appointed by the Commons to examine into their privileges, have done him the honour of using his researches freely, but of course without any derogatory acknowledgment. In No. 74 of the *Remembrancer* (June 23rd), Mr. Toulmin Smith thus states the case:—"It must be

remembered what the actual question now raised is. It has already been shown that any precedent, to be in point, must be one touching the arrangements of supply for the service of the state. * * * * The line must be distinctly drawn between bills of this nature, and bills which, being on general matters, whether commercial or touching police, happen incidentally to include penalties, fees, or alterations in tariffs. No doubt, questions of privilege are involved in each of these latter cases, and each has its own importance. But each must be dealt with according to its own circumstances; and such cases cannot be mixed up with the present case without creating confusion, and drawing off attention from the main and real point at issue. In this case the facts are, that the Commons had considered and agreed to a scheme for the supply service of the state. Whether the particular scheme agreed to were wise or unwise, is not now in point at all. That scheme consisted of several parts, though forming one whole. Two of the parts which were avowedly correlative, were the repeal of one tax (Paper Duty), and the imposing of another (penny Income-Tax) in its place. Bills for both purposes passed the Commons, though unwisely; not joined into one bill, as should have been done. The Lords passed the Income-Tax bill, even suspending their standing orders for the purpose (see before, pp. 144, 145); but, when the other bill came up, they rejected it. In doing this, while they have committed a clear breach of good faith, they have attempted to impose by their own authority alone a charge upon the people. The disregard of good faith must be deplored by all who regard the honour of the House of Lords as a possession valuable among the securities for our institutions. But as to the imposing of a charge upon the people, which is what alone has now to be dealt with, the question to be settled is, whether the Lords have ever pretended before to have authority to impose a charge upon the people; and, if they have, whether such a pretension has ever been admitted by the Commons. It is these hard facts that have alone to be looked at, and not any speculative theories or party objects that are to be patched up and made passable."

The Report of the Privilege Committee and Mr. Collier's Resolution¹ are happily commented on in a subsequent page, (No. 74, p. 171, June 30th.)

"This Report will not be found to satisfy the terms of the Committee's appointment. 'The practice of each House' has not been searched into, and reported on. The cases given are those that were easiest to collect; but they are not those that are most important, in fact absolutely essential, to a true knowledge of that practice. Beyond this, a fundamentally erroneous statement stands at the beginning of the Report, namely, that it was in 1628 that the present form of

¹ "That it being the fundamental right of the Commons alone, according to the ancient usage of the constitution, to determine the taxation to be levied on the people as to the matter, the measure, and the time, the rejection by the House of Lords of a Bill repealing a tax which the responsible advisers of the Crown and the House have concurred in deeming unnecessary to meet the supply granted by the House to her Majesty for the service of the year, is a breach of constitutional usage, and an encroachment on the proper functions of the House."—Mr. Collier's speech in the debate was masterly; indeed he was the only lawyer who did distinguish himself.

granting the supplies may be said to have been practically established. This statement is wholly contrary to the fact, as has been thoroughly shown in the foregoing pages; and the putting such a statement on the front of this Report amounts, in reality, to a complete abandonment of the very foundation and meaning of the whole rights and privileges in question.

"Happily, the report is inconsistent with itself. Though the committee have not, in truth, searched for precedents; though they begin with 1628 only, and leave untouched the most important parts of the history, the attention which has been called, in these pages, to the Statutory Declaration of 1407, has made it impossible for the committee, in the end, to leave this unnoticed. They have stultified themselves, and shown their inability to grapple with such a subject, by actually inserting in their Report, at full length, the Record of 9 Hen. IV., which itself contradicts their own first proposition, and demonstrates that the whole course of their procedure has been erroneous. But what makes the matter somewhat ludicrous is, that the translation of this Record of 1407 that is embodied in the Report, is taken *verbatim* from the *Parliamentary Remembrancer* (of course without acknowledgment); and this, even to the incorporation of some trifling slips in phraseology, which were likely to creep into the first translation of such a document from a crabbed language; for no translation into English of this document is known to exist before the one given in these pages. There is thus given a curious proof of the way in which this committee have 'searched for precedents.' References to Clarendon, Pym, Coke, etc., which the committee had not succeeded in discovering in the course of their own arduous labours, have been also adopted from the foregoing pages."

We will make yet one more extract from Mr. Toulmin Smith's criticism on this subject, which we find in No. 70, (May 26.) It will be perceived that he takes a far more serious view than we do of the mischiefs which are likely to arise from this Vote of the Peers.

"A question that so much needs to be looked at from a constitutional and statesmanlike point of view, has been dealt with after a manner that can cause only regret and foreboding to those who can look, beyond the triumph of the moment, to the lasting results which ought to be always kept before the eye of a far-sighted statesmanship. All history will be belied if this vote be not found to have been suicidal."

"That the technical character of the vote should be clearly put before the House, as part of the materials on which it should shape its course, was not only natural, but right. And no one could deal with this part of the subject with so much authority as Lord Lyndhurst. The reports of Lord Lyndhurst's speech seem, however, to show that, while he put before the House its actual opportunity of voting, he withheld from suggesting the way in which that opportunity should be made use of. A technical power gives need that the actual conduct should be the more gravely considered. The technical power of the House of Lords to reject this Bill, was distinctly stated before, p. 125. The illustrations given by Lord Lyndhurst are not open to dispute;

but the all-important consideration is, whether they touch the constitutional and statesmanlike bearings of the question. As the Lords have now committed themselves to a conflict between the two Houses, it becomes more than ever necessary that there should be a thoroughly right understanding of the facts that bear upon the position of both Houses, and of the relation in which the technical power of the Lords, and the constitutional use of that power, stand to one another.

"The answer to Lord Derby's question—why are the Bills sent to the Lords if they may not properly reject them?—is very short. There is often a technical right to do a thing, which it would be very unwise actually to attempt. The appointment of a bishop is only complete when he has been elected by the chapter. Can the chapter therefore reject the bishop elect? A poor rate (to come down to a matter of taxation) is only complete when it has been 'allowed' by the justices. Can the justices therefore reject it? If they assert their technical position, the Court of Queen's Bench will compel them to 'allow' it, by a mandamus absolute in the first instance. When chapters really elect bishops, and justices really exercise a discretion in allowing rates, it will be time enough to consider the force of Lord Derby's logic as to a certain class of bills that pass through the House of Lords. But beyond this he contradicts himself; for he goes so far as to say that certain bills may not be 'amended,' though they go through all those stages of the Lords' House, the only use of which is to invite amendments. The formal technical right is thus admitted by Lord Derby to be not a concurrent thing with the practical consideration of such Bills.

"None of the precedents quoted by Lord Lyndhurst touches the constitutional and statesmanlike bearings of this case. Those precedents are strictly limited to the technical right of the House of Lords. But it is necessary to show that they have no further application, in order to prevent wrong inferences being drawn from them.

"The essence of all scientific research consists, in the constant distinguishing of what is accidental from what is essential in the objects that are compared. The comparison of one fact in natural history with another, is (if each be rightly done) a process identical with that of using a precedent in law or history to interpret a case in hand. No precedent is of any value whatever, unless it have two distinct characteristics:—first, that the actual circumstances that marked it, were the same as those present in the case which it is brought up to illustrate; second, that the point of view which it is brought up to illustrate, itself came in question in the case of that precedent, and, having come in question, was decided after a review of the well-considered bearings on each side. A precedent is worthless unless it records a point raised, discussed, and settled. The mere happening of a case, if no question was raised, discussed, and settled, can be no test whatever.

"In dealing with constitutional questions, this consideration (which has already been lately touched on in a matter of parliamentary practice, arising on this Paper Duty Repeal Bill: before, p. 119) becomes

of even more than ordinary importance. It becomes, indeed, the one vital consideration. For, while a private man will oftentimes submit to a wrong rather than rush into litigation to contest his right—though not, by his forbearance, acknowledging the wrong to be right—there is a still stronger tendency in political affairs, not ultimately to contest questions of right, until forbearance has been driven to a length that is unendurable.

“Were this not so, and were the mere fact of the existence of naked precedents to be of any binding force in constitutional questions, the very startling result would follow, that such monuments as the Petition of Right and the Bill of Rights, instead of being records and bulwarks of the liberties of Englishmen, would themselves be proofs that those liberties have no existence. The Petition of Right records the fact of diverse commissions, and imprisonings, and extorted taxes, and military vexations, and forejudgings of life and limb, and escaped punishments. These were admitted precedents of facts. It so happened that at last they became questioned; and, being questioned, were determined; and were declared by the Petition of Right to have been unlawful and unconstitutional. Lord Lyndhurst quoted nine precedents as to the fact of the Lords having rejected certain Bills. The Bill of Rights records twelve distinct sets of precedents of acts done in the name of the crown. Was England therefore bound by these? On the contrary, those precedents had accumulated to such a height, that it was impossible to go on any longer without declaring that they were, every one of them bad as precedents; that they had been illegal; and that they only yielded cumulative proof of a course of unconstitutional action. This important consideration might be very much further illustrated. The result is, however, obvious enough; namely, that a naked and undeniable precedent is proof of nothing but of its own existence, unless in case where, first, the circumstances are identical; and, second, a question has been raised upon those circumstances, and has been discussed, and thereupon settled. Even then, as in the case of the judgment given against John Hampden in the ship-money case, the precedent is not conclusive unless it can be shown that it has been always acquiesced in.”

These extracts, emanating as they do from the pen of one always entitled to a hearing, and often to be regarded as an authority, deserve to be well weighed.

BANKRUPTCY BILL.—Whilst we are writing, the attorney-general's bankruptcy bill has given its last struggle. It was suffering night by night from loss of blood and limbs. We had hoped that the bleeding would not destroy its vitality, but that it might become invigorated by the civilized and educated lancet; and we trusted that no permanent crippling would be effected by that vulgar and careless lopping which is sometimes substituted for the masterful amputation. But it has turned out otherwise, and the attorney-general, on the 19th July, withdrew the bill on grounds which were sufficient.

We do rejoice to hear that this bill has failed, and indeed we hope that many others now before the Houses of Parliament, and which are of public importance, will likewise fail in being carried through. There will then be some chance of the eyes of the people being opened to the defective Parliamentary machinery now at work, which is utterly incompetent for the purposes required of it. A genuine and general break-down will be most beneficial.

NEW COURTS OF JUSTICE.—The report of the Commissioners appointed to inquire into the expediency of *concentrating all the superior courts and offices* of the metropolis into one place, has recently been published. We have for years been hammering at this question.¹ It is now twenty years since it was discussed, and again in 1845, on the motion of that able and amiable man, Charles Buller, a committee of the House of Commons was re-appointed to consider it. The commissioners report that they have no division of opinion or difficulty in determining that a concentration is desirable; and further, that the accommodation of the profession and the public ought no longer to be shamefully neglected. To which we may be allowed to add, that, if the laying and carrying out of a comprehensive plan be left to architects alone, or to any one who has not had experience of the combined and conflicting interests of all classes, divisions, grades and contingencies belonging to public courts of justice—another great failure will be added to the list of our public buildings.

With regard to the site, the commissioners say—"We have therefore been brought to the consideration of the remaining site. In favour of this, we have the concurrent testimony of witnesses from every branch of the profession. It is so near to Lincoln's-Inn Fields, that, as to actual convenience of position, little difference exists between the two, but that little is in favour of this last; it has, as regards the metropolis, the great benefit of being a substitution for a neighbourhood of close and ill-built streets, badly ventilated and drained, and in respect of part, at least, very disreputably inhabited; it is large enough for the purpose required, and the quantity of ground to be taken may be more or less, according as the details of the building may require a greater or less area; all sanitary considerations are in its favour; it will at once have a good frontage towards the south, and it labours under no greater difficulties in this respect, on the north and other quarters, than the site proposed by Mr. Gem (part of Lincoln's-Inn Fields). The intervention of Fleet-Street and the Strand, with their traffic, entirely disproportionate to their width, must create a difficulty in either plan as to the communication from the Temple; it has been proposed to remedy this by a glazed viaduct over Fleet-Street, or a tunnel under it. Neither of these plans is free from inconvenience, it must be admitted; but we apprehend that no plan entirely free could be suggested, and the inconvenience to be submitted to

¹ *Vide postea* L. M. and R., vol. VI. p. 348.

must, after all, be weighed against that which the occupiers of chambers in the Temple labour under at present."

For information concerning the funds required, and the source whence they may be obtained, the reader curious on such trifling matters of detail (involving less than a million upon the most extravagant calculation), may either refer to the report itself, or our Number for 1859.

In the article here mentioned, we protested against the mere "clearance of the miserable lanes and alleys," to make room for our great *Palais de Justice*. The seven or eight acres loaded with houses in the locality indicated, are, it is true, the abode of much poverty and some vice; also of a hard-working, honest population, who engross our deeds, print our books, stitch our pamphlets, look after our warehouses, offices, and chambers. Inferior as their homes are compared to what they should be, yet to turn out these multitudes, and appropriate their residences to other purposes, without making any provision for their getting other house-room, would be a repetition of the cruelty which has already produced, in immorality, pestilence, and death, abundant fruit in the great city. All that is not absolutely required for the great building, should certainly be regularly appropriated for the construction of adequate houses of residence for the classes which now occupy the neighbourhood.

JUDICIAL STATISTICS.—A new issue of these judicial statistics¹ has recently appeared, on which we shall comment in our next Number.

THE LAW AMENDMENT SOCIETY.—This Society has done its work for the session—has holden its meetings, received its 17th report from its council, and eaten its annual dinner. The report congratulated the Society on the progress of public opinion in favour of law reform, but reminded it that vigorous exertions were still necessary for further promoting the objects they had in view. In the present session of parliament, the only measures of law amendment which had proceeded from the government were the law and equity bill, and the bankruptcy bill. With regard to the former, there was no likelihood of its passing into law this session, and the progress of the latter had hitherto been so slow as to justify the apprehension that it would have to stand over for another year. Something of this was, no doubt, to be ascribed to the discussions on the French commercial treaty, the budget, and the reform bill; but such failures would continue to be general until a department of justice was established to prepare all measures relating to the amendment of the law, and to superintend their progress. The report then entered into a detail of the subjects considered by the Society during the past year, including the mode of taking scientific evidence in courts of law, charitable trusts, bank-

¹ Vide I. M. & R. for Nov. 1859, p. 152.

ruptcy and insolvency, the law of lunacy, the transfer of land, the judicial settlement of issues to be tried, the establishment of a law university, &c.

Lord Brougham made some apposite remarks upon the report and the debate which ensued. After exposing the "observations" of the Equity judges in reference to the Law and Equity Bill, and replying to Mr. Symond's complaints that the Society did not undertake to overthrow and build up the whole law of England afresh, his Lordship proceeded to say—"We had a system of jurisprudence in which there was a vastly greater amount of good than of evil, a vastly greater amount of what was perfect and ought to be retained without alteration, than there was of that which was injurious in practice and ought to be repealed; a vastly greater body of law good in itself, and which only required to be amended in certain particulars, carried further in some points where it stopped short, and lopped off where it was redundant, than there was to be found in the jurisprudence of any other country whatever. Such being the case, all that could be safely and judiciously done was to find out whatever defects existed, and remedy them. When the law failed, alter it; where it stopped short, carry it further; and where there was a superabundance of bad law, lop it off. He apprehended that that could only be done in this way, namely, by placing before the profession, the public, and parliament, in detail, those defects as they were discovered in practice. Some of them were already well known, but a vast number of defects were daily coming into notice; nay, laws before supposed to be perfect, were daily found by experience to be in some points injurious in practice. They ought, then, to profit by that experience, and where the evil was discovered, there apply the remedy. That was not only unavoidable, in consequence of our system having in it more of what was good than evil, but was also the safer and more judicious course of proceeding, for legislation was emphatically an experimental science, and in the prosecuting it they had to go by experience. They must, in making the voyage, have their chart and their log in their hands. When among shoals they should take care that they did not make shipwreck, and when on the open sea that they did not proceed in the wrong direction. It was their duty as amenders of the law, if they wished to call themselves improvers of the law, never to apply a remedy where experience had shown that it was not wanted; and when they had applied a remedy, or made a new law, never to hesitate to retrace their steps when experience had shown that they had proceeded in a wrong direction, or gone too far; and that was, he believed, the real sound philosophy of law amendment. It was practical, and what all men who wished to profit by experience ought to guide themselves by. He had always made it his own rule of proceeding, and the Society had gone on it from the commencement of its career. In general, the great object they had aimed at was the substitution of natural for technical procedure. Such, too, had been the great object of the late Mr. Bentham's labours, and such was the description of their acts. He doubted if he had ever brought in a bill that had not that object; but he was certain

that he had never succeeded in carrying a bill that was not to substitute for a technical a natural system of procedure. He could mention many instances, but he would confine his observations to that one which was the greatest improvement of later years ; but, before doing so, he would say a word on procedure in the two branches of law as established. The form of procedure was so important in the administration of justice, that it had been often said that a bad law under a good system of procedure was equally as beneficial as a good law administered under a bad system ; and he could well conceive that there might be a bad system of jurisprudence in which crimes and punishments, rights and wrongs, were confounded, and nothing in a satisfactory state ; but owing to the procedure being based upon a sound principle, justice was administered as efficiently as where, although the law might be good, the procedure was exceedingly bad. They had lately had a great improvement of the law of evidence, which had introduced a new procedure, and a most beneficial one. The first improvement was made by Lord Denman in 1843, when he brought in his bill to make an interest in the event of a suit no objection to the competency of a witness, leaving the value of his evidence to the consideration of the court and jury. That was followed by a bill which he himself introduced in 1851, and which, owing in a great measure to the labours of the Law Amendment Society, he succeeded in passing into law, notwithstanding great opposition from the highest judicial authority in the kingdom, and also, although it was not publicly expressed, from the learned judges themselves. That measure, allowing all parties in the suit, the plaintiff and his wife, to give evidence, had been found to be of the greatest possible advantage in the administration of justice ; and the report of the Common Law Commissioners proved it to have been of the utmost advantage in securing truth, which was the great object in the administration of justice. He was disposed to carry the principle a step farther, and allow a person on trial for a criminal offence to give evidence, subject to cross-examination, on his own behalf ; but that was so much objected to, that he yielded so far as to withdraw it last session and the session before. Three days ago, however, he again introduced a similar bill, but confining it to cases of misdemeanour. It might naturally be supposed that the bill in question had been suggested by a late case, in which, in consequence of a man and his wife not being allowed to be examined at his trial, he was convicted of an offence, and then in his turn prosecuted the principal witness against him, when, as her mouth was closed, she was convicted of perjury on his evidence and the evidence of his wife. Nothing more clearly showing the inconsistent and preposterous state of the law could be conceived than that case ; but still it was not owing to it that he had introduced his bill, for last year and the year before he had before the legislature a much larger measure, and which he withdrew more on account of the reluctance than of the arguments which he had to encounter in proceeding with it. Generally speaking, he was adverse to legislation on account of particular cases. When a new act was passed under such circumstances, those who framed it were very apt to take a partial view of what the law ought to be, and

make the new act tally with that particular case. There was no doubt it was very fit so to proceed in some cases ; for the proof of the defect of the law having arisen in practice, that in itself was a sufficient ground for the alteration. For instance, it was some time since found, on the prosecution of certain bankers in the City, that there was a great defect in the law of trusteeship, and that was made the ground on which a new law was passed, based on sound principles, and which was a great amendment of the criminal law. A great deal had been said of a department of justice, and nothing was more clear or more evident than the absolute necessity of such an institution. Various reasons had been stated for adopting that course, one of which was the necessity which existed for some supervision of the bills about to be introduced into parliament ; and when they considered how bills were introduced by one department of government without any communication with another, they would see how absolutely necessary it was that there should be some superintendence. This was more particularly the case with respect to private bills, as had been mentioned by his learned friend Sir Francis Goldsmid. He would mention a case or two in point. The late Sir Samuel Romilly, by accident, once detected in a parish bill a clause giving the overseers power to flog the paupers. Again, in a late appeal in the House of Lords, in which the Great Western Railway Company was a party, it was suggested to them that the company's act gave great force to the minutes of their proceedings—that, in fact, they were by law proof conclusive of all payments made by the company—not payments made to the company, but payments made by it ; and not only that, but that any copy of the minutes should be proof conclusive of the payment. When he and his noble friend Lord Lyndhurst had heard that, they could not believe it possible, but on sending for the act of parliament they found that such was the case. With a minister of justice to supervise all bills, such a thing would be impossible. The objection that such a department would supersede the legislature had no force in it, as all that was meant was that it should be a department auxiliary to parliament. Another object of the department was, that the minister of justice might act as assessor to the Secretary of State in the difficult and always delicate question of the exercise of the prerogative of pardon by the Crown. It was unnecessary for him to enter into a particular statement of instances which had occurred within the last two years, in which it would have been expedient that the determination of the question of pardon, instead of being confined to one person, had been intrusted to two or more.

At the dinner, where Lord Brougham presided, there was, as usual, a due mingling of wit with wisdom, of jurisprudential topics with gastronomy. On the whole, the animal and intellectual were combined in a very pleasant and profitable manner.

APPOINTMENTS, &c.

MR. BINGHAM having resigned the office of Magistrate of the Marlborough Street Police Court, Mr. Tyrwhitt of the Clerkenwell Police Court was appointed to succeed him: Mr. D'Eyncourt of the Worship Street Police Court has succeeded Mr. Tyrwhitt, and Mr. John Henry Barker, of the Midland Circuit, has been appointed to be Magistrate of the Worship Street Court. Mr. Barker was called to the Bar in the year 1836.

Mr. Nichols has been appointed a Commissioner of the Insolvent Debtors' Court, in the room of the late Mr. Serjeant Murphy, deceased.

J. H. Brewer, Esq., of the Midland Circuit, has been appointed to the Mastership of the Queen's Bench, in the room of Sir Fortunatus Dwarria, deceased.

Thomas Norton, Esq., of the Home Circuit, has been appointed Master of the Crown Office.

C. E. Ellison, Esq., Barrister-at-Law, has been appointed Stipendiary Magistrate of the City of Manchester; Mr. Ellison previously held the office of Police Magistrate at Newcastle-on-Tyne.

W. L. Birkbeck, Esq., Barrister-at-Law, has been elected Downing Professor of Law at Cambridge, in the room of the late Andrew Amos, Esq., deceased.

Her Majesty has been pleased to appoint James Vaughan, Thomas Irwin Barstow, and Franklin Lushington, Esqrs., Barristers-at-Law, to be Commissioners, for the purpose of making inquiry into the existence of bribery at the last election for the town of Berwick-upon-Tweed; and C. E. Coleridge, Esq., of the South Wales Circuit, has been appointed Secretary to the Commissioners.

IRELAND.—At the sitting of the Court of Chancery in Dublin, July 3rd, the following gentlemen were called within the bar:—Mr. Henry O'Hara, of the Leinster Circuit; Mr. Dominick M'Causland of the North-West Circuit; Mr. Thomas K. Lowry, LL.D., of the North-East Circuit; Mr. Henry M. Pilkington; Mr. John W. Carleton of the Connaught Circuit; Mr. Hugh Law, of the North-East Circuit; Mr. Francis W. Brady, of the Munster Circuit; and Mr. Denis Caulfield Heron, LL.D., of the same Circuit.

SCOTLAND.—Mr. Andrew Murray, jun., Writer to the Signet, has been appointed Crown Agent for Scotland, in the room of the late Sir John Melville.

INDIA.—Sir Mordaunt Wells, one of the puisne judges of the Supreme Court at Calcutta, has become a member of the Legislative Council in India. Mr. Serjeant (now Sir Mordaunt) Wells was appointed to the judgeship about eighteen months ago.

AUSTRALIA.—Archibald Paul Burb, Esq., has been appointed Civil Commissioner and Chairman of Quarter Sessions for the Colony of Western Australia.

NOVA SCOTIA.—The following appointments have been made by the Queen in this Province, viz.:—Adams G. Archibald, Esq., to be

Attorney-General; Joseph Howe, Esq., to be Provincial Secretary; William Annand, Esq., to be Financial Secretary; Jonathan M'Cully, Esq., to be Solicitor-General; and J. H. Anderson, Esq., to be Receiver-General.

MAURITIUS.—C. F. Shand, Esq., has been appointed Chief Judge of the Supreme Court of this island, and E. Nolin, Esq., has been appointed Crown Solicitor.

ST. CHRISTOPHER.—Francis Spencer Wigley has been appointed Attorney-General for the island of St. Christopher.

HONG-KONG.—W. H. Adams, Esq., late Attorney-General, has been appointed Chief Justice, and T. F. Callaghan, Esq., of the Munster Circuit (Ireland), has been appointed Chief Magistrate of this colony.

PRINCE EDWARD'S ISLAND.—Her Majesty has been pleased to appoint John Hamilton Gray, Joseph Howe, and John William Ritchie, Esqrs., to be Commissioners to inquire into and adjust the differences relative to the rights of landowners and tenants in the Island of Prince Edward.

CALLS TO THE BAR.

Trinity Term, 1860.

INNER TEMPLE.—Henry Peter Pisani (certificate of honour of the first class); John William Mellor; James Tidsall Woodroffe; Robert William Kirby Martin; Julian Robins; Arthur Paul Stone; William Richard Woolrych; Richard Temple Rennie; John Alfred Burkin-young; Robert Henry Bullock Marsham; Francis Thomas Plate and Henry O'Hara Moore, Esqrs.

LINCOLN'S INN.—John Francis Rotton; Edward William Gordon; Charles Walker; Charles Dacre Craven; Arthur Duke Coleridge; Holland Franklyn; Albert Nevins Flintoff; John Werrett; Edward Henry Sayer Milward; Napoleon Gibbs; Henry Elwyn Hyde; William Henry Cleaver; Thomas Robinson Williams; Hugh Pigot; William Spencer Ollivant; Robert Wyatt, and Edward Beldam, Esqrs.

MIDDLE TEMPLE.—Frederick Adolphus Philbrick (holder of the Studentship awarded by the Council of Legal Education); Frank Cockburn; Etienne Pellereau; Joseph Deakin; Edward Comyn, and Edward Backhouse Estwick, Esqrs.

GRAY'S INN.—Arthur John Hammond Collins, and John Beavis Brindley, Esqrs.

PUBLIC EXAMINATION OF THE STUDENTS OF THE INNS OF COURT,
*Held at Lincoln's Inn Hall, on the 18th, 19th, and 21st days
of May, 1860.*

THE Council of Legal Education awarded to James Wilson, Esq., a Studentship of Fifty Guineas per annum, to continue for a period of three years; to H. P. Pisani, Esq., and D. A. Freeman, Esq., Certif-

cates of Honour of the First Class ; and to F. T. Platt, T. Watson, C. Walker, E. F. A'Beckett, J. T. Woodroffe, A. Brandreth, A. N. Flin-toff, H. Pottinger, R. C. Rogers, E. J. Athawes, and J. Werrett, Esqrs., Certificates that they had satisfactorily passed a public examination.

EXAMINATION OF CANDIDATES FOR ADMISSION ON THE ROLL OF
ATTORNEYS AND SOLICITORS.

The following Prizes and Certificates have been awarded by the Incorporated Law Society to candidates under the age of twenty-six years :—

Easter Term, 1860.

Prizes of books were awarded to—

G. P. Allen, W. Ram, H. Handson, and J. T. Beard, Esqrs.

Certificates of merit were awarded to—

W. Mayhew, N. Brooking, G. A. Daniel, B. Dowson, I. S. B. Glasier, W. S. Harding, H. Houseman, J. G. Jones, J. W. Middleton, H. L. Pemberton, H. Russell, D. B. Squire, W. B. Tanner, J. B. Taunton, and J. H. Taylor, Esqrs. The examiners also announced that the answers of C. J. Eldred, Esq., to the questions at the examination, were highly satisfactory, and would have entitled him to a certificate of merit if he had been under the age of twenty-six.

Trinity Term, 1860.

Prizes of books were awarded to—

W. C. Boyle, A. B. Rowley, A. R. Harding, and A. H. Clarke, Esqrs.

Certificates of merit were awarded to—

H. F. Killick, F. J. Baily, T. Hewitt, T. F. Leadbitter, J. H. Priestly, J. Rhodes, J. H. Roberts, A. J. Soden, and R. Stephenson, Esqrs. The examiners also announced that the answers of the following candidates to the questions at the examination were highly satisfactory, and would have entitled them either to prizes or certificates of merit if they had been under the age of twenty-six :—T. Beasley and J. Bidlake, Esqrs.

Pecrology.

March.

- 20th. WARD, William F., Esq. (at Melbourne), Barrister, aged 37.

April.

- 11th. WESTMACOTT, H. S., Esq., Solicitor, aged 55.
 18th. MORRISON, Alexander, Esq., Dean of the Faculty of Procurators, aged 74.
 23rd. OSBORNE, John F., Esq., Solicitor, aged 71.
 24th. SMYTHE, Thomas, Esq., Barrister, aged 58.
 28th. NOBLE, William G., Esq., Solicitor.

May.

- 5th. GARNHAM, Richard E., Esq., Solicitor, aged 36.
 8th. SMITH, James, Esq., Solicitor, aged 63.
 11th. WHITWORTH, John, Esq., Solicitor.
 13th. FULLHAM, Edward, Esq., Solicitor, aged 48.
 20th. DWARRIS, Sir Fortunatus, Knight, F.R.S., one of the Masters of the Court of Queen's Bench, and a Bencher of the Middle Temple, aged 73.
 20th. JARVIS, Stephen, Esq., late of the Prerogative Office, aged 68.
 21st. MORLEY, William H., Esq., Barrister, aged 45.
 27th. BAUGH, George, Esq., Solicitor, aged 29.
 29th. EMERSON, Hugh A., Esq., late Ex-Solicitor-General of Newfoundland, aged 66.

June.

- 1st. BIRKS, John, Esq., Solicitor, aged 88.
 4th. FORD, William, Esq., Solicitor, aged 69.
 8th. DOYLE, James P., Esq., Barrister, aged 45.
 15th. COX, John, Esq., Solicitor.
 16th. O'HANLOW, Patrick M., Esq., Sessional Crown Solicitor for the county Louth.
 18th. SHACKLETON, Thomas, Esq., Solicitor, aged 70.
 19th. ELLIS, William, Esq., Barrister.
 21st. WEBSTER, Charles, Esq., Barrister.
 22nd. HARRISON, Robert O., Esq., Solicitor, aged 38.
 25th. TRUWHITT, George, Esq., Solicitor, aged 76.
 29th. BROUGHTON, R. E., Esq., late one of the Magistrates of the Marylebone Police Court.

July.

- 1st. **BARRETT**, William, Esq., Solicitor, aged 67.
- 2nd. **FEW**, R., Esq., Solicitor, aged 83.
- 6th. **NICKS**, Thomas, Esq., Solicitor (and Registrar of County Court),
Warwick, aged 41.
- 8th. **JERVIS**, John, Esq., late Associate of the Court of Common
Pleas.
- 13th. **HORNE**, Sir William, late Master in Chancery, aged 87.
- 13th. **WILSON**, William M., Esq., Solicitor, aged 40.
- 15th. **SOWTON**, William M., Esq., Barrister, aged 44.

List of New Publications.

Addison.—Wrongs and their Remedies ; a Treatise on the Law of Torts. By C. G. Addison, Esq., Barrister. Royal 8vo, 30s. cloth.

Bell.—Principles of the Law of Scotland. Fifth Edition, Edited by Patrick Shaw, Esq. 8vo, 23s. cloth.

Best.—A Treatise on the Principles of the Law of Evidence, with Elementary Rules for conducting the Examination and Cross-examination of Witnesses. By W. M. Best, Esq., Barrister. Third Edition. 8vo, 28s. cloth.

Brougham's—Law Reforms, comprising the Acts and Bills introduced or carried by him through the Legislature since 1811, with an Analytical Review of them. By Sir John E. Eardley Wilmot. 12mo, 4s. 6d. cloth.

Bullen and Leake.—Precedents of Pleadings in Actions in the Supreme Courts of Common Law. By E. Bullen and S. M. Leake, Esquires, Barristers. 8vo, 20s. cloth.

Glen.—The Law relating to the Licensing of Refreshment and Wine Houses, and the Wine Licences and Refreshment Houses Act, 23 Vict., cap. 27, popularly explained. By W. C. Glen, Esq., Barrister. 12mo, 2s. sewed.

Hensman.—Handbook of the Constitution. By Alfred P. Hensman, Esq., Barrister. 12mo, 4s. cloth.

Heron.—An Introduction to the History of Jurisprudence. By Dr. Caulfeild Heron. 8vo, 21s. cloth.

Hilliard.—The Law of Torts, or Private Wrongs. By F. Hilliard, Esq. 2 vols. royal 8vo, 56s. cloth.

Le Riche.—A Book of Costs in the Common Law and Divorce Courts ; with Observations on the Principle of the Allowances, and an Analysis of Decisions upon Costs, from the time of passing the First Common Law Procedure Act, &c. By E. W. Le Riche, Esq. Royal 12mo, 5s. cloth.

Macqueen.—A Practical Treatise on the Law of Marriage, Divorce, and Legitimacy, as administered in the Divorce Court and the House of Lords. By J. F. Macqueen, Esq., Barrister. Second Edition. 8vo, 18s. cloth.

Marshall.—The Law of Costs in all Suits and Proceedings in Courts of Common Law, also in Probate and Matrimonial Causes ; with an Appendix of Tables of Fees and Costs and Precedents of Bills of Costs. By Walker Marshall, Esq., Barrister. 12mo, 21s. cloth.

Peachy.—A Treatise on the Law of Marriage and other Family Settlements ; with Precedents and Practical Notes. By James P. Peachey, Esq., Barrister. Royal 8vo, 36s. cloth.

Saunders.—The Refreshment Houses and Wine Licences Act. By T. W. Saunders, Esq., Barrister. 12mo, 2s. sewed, 2s. 6d. cloth.

Smith.—The Law of Contracts. Third Edition. By John George Malcolm, Esq., Barrister. 8vo, 16s. cloth.

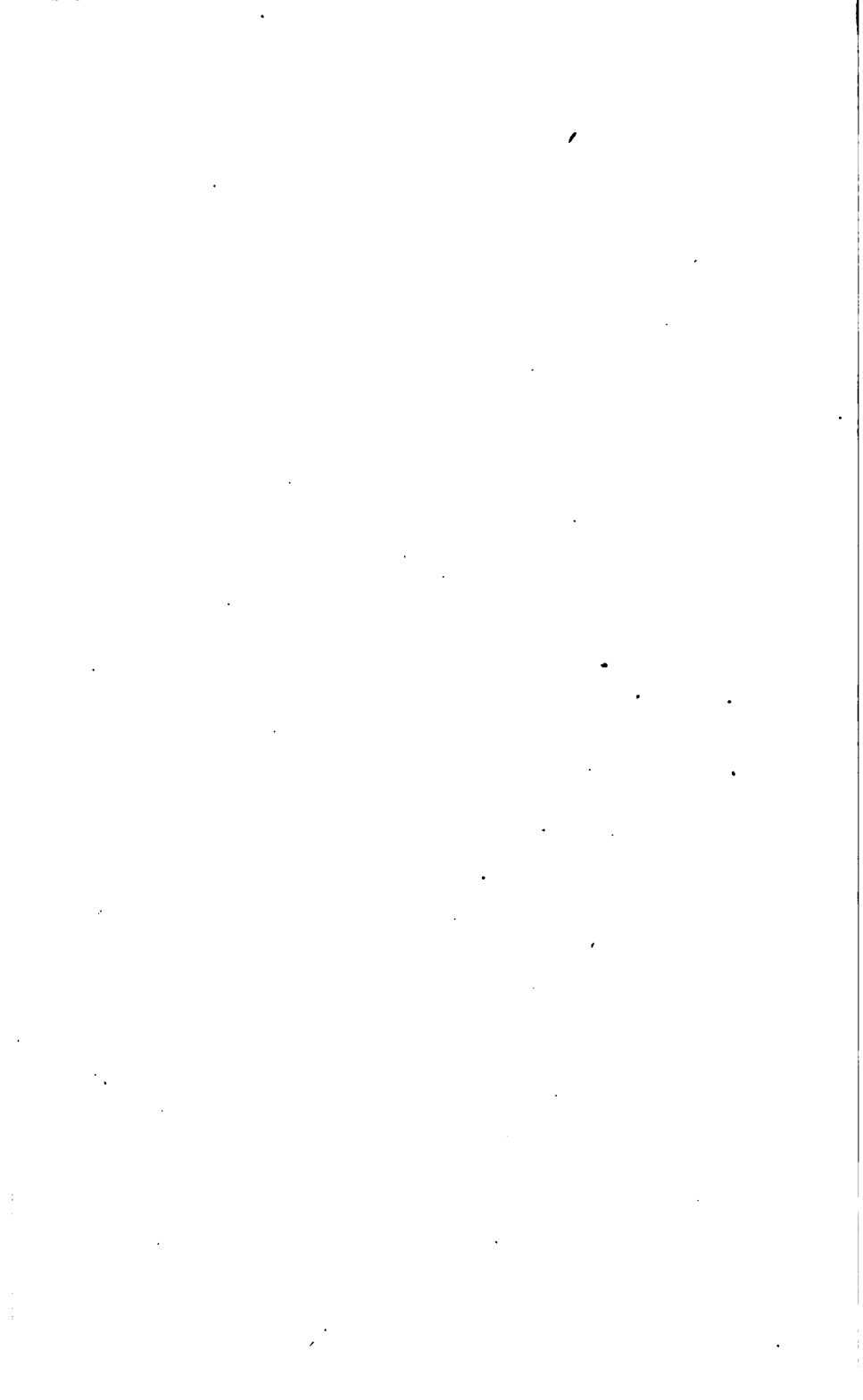
Smith.—The Lawyer and his Profession. Series of Letters to a Solicitor commencing Business. By J. O. Smith, Solicitor. 12mo, 4s. cloth.

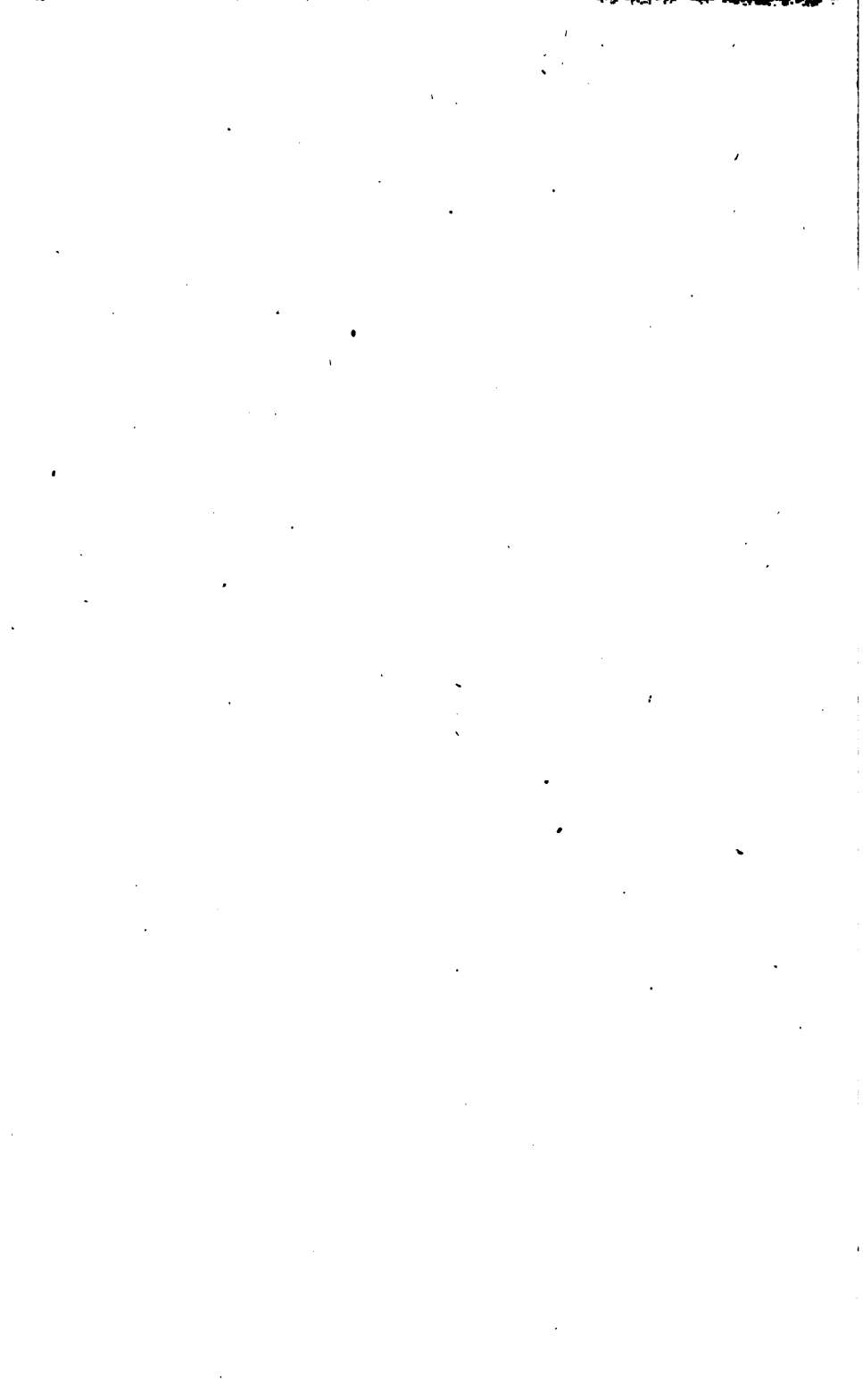
Smith.—A History of Education for the English Bar, with suggestions as to Subjects and Methods of Study. By P. A. Smith, Esq., Barrister. 8vo, 9s. cloth.

Smith.—An Elementary View of the Proceedings in an Action at Law. Seventh Edition. By Samuel Prentice, Esq., Barrister. 12mo, 10s. 6d. cloth.

Vacher's.—Pocket Digest of Stamp Duties, including the new Act of 1860, with General Directions on Stamped Instruments. Fourth Edition. 18mo, 2s. cloth, sewed.







Stanford Law Library



3 6105 062 734 970

